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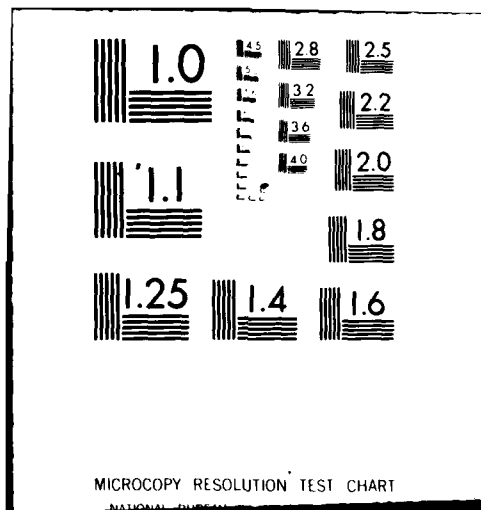
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Office of Management and Budget Circular No. A-76

As a Statement of Federal Procurement Policy

By

David John Kuckelman

B.A. May 1973, Kansas State University

J.D. May 1976, University of Kansas School of Law

A thesis submitted to

The Faculty of

The National Law Center

of The George Washington University in partial satisfaction
of the requirements for the degree of Master of Laws

February 17, 1981

Thesis directed by

Ralph Nash, Jr.

Professor of Law

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ABSTRACT

This thesis examines the Office of Management and Budget Circular No. A-76(1979) from an historical perspective. The scope includes identification of the problem of Government competition with private enterprise and the need for a national policy; the three, co-equal precepts embodied in the revised Circular A-76; and the enforceability of Circular No. A-76 through the process of internal audits or reviews.

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FOREWORD

The author is a Captain, Judge Advocate in the United States Air Force, currently assigned to the Air Force Systems Command and stationed at F-16 CASEUR Brussels, Belgium.

The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of Defense, or any other agency of the United States Government.

CHAPTER I

INTRODUCTION

Scope and Purpose

This thesis examines the Office of Management and Budget (OMB) Circular No. A-76 (1979) from a historical perspective.¹ The Introduction provides some background on the identification of the problem of Government competition with private enterprise and the need for a national policy. It also discusses the independent roles of the Legislative and Executive branches of the Government in the development of a policy of reliance on private sources to supply the Government's needs and the initiation of an implementation program. This first chapter is treated as an introduction because it focuses primarily on the seminal actions of Congress and the President which had an impact on the development of the policy announced in Circular No. A-76 and its predecessors.

Chapters Two and Three consider the history and evolution of the Executive branch policy in the series of Bureau of the Budget and Office of Management and Budget directives specifically.² The discussion in Chapter Two centers on the current statement of three, co-equal precepts embodied in the revised Circular No. A-76. The conceptual development of each precept is traced through the progression of bulletins and circular revisions. The scope of the policy and its application to the procurement of goods and services is discussed in Chapter Three.

Implementation of the policy of reliance on private enterprise has involved a number of specific problems. Some of these problems are dealt with in Chapters Four and Five. Chapter Four concerns cost comparison studies. Particular emphasis is placed on the circumstances requiring use of a cost study, the problems associated with estimating the cost of Government operation and making a valid comparison with the costs of contract performance.

Chapter Five discusses the enforceability of Circular No. A-76 through the process of internal audits or reviews; an administrative, intra-agency appeals process; as well as extra-agency reviews through the General Accounting Office (GAO) bid protest procedure and judicial review under the Administrative Procedure Act.³ The focus of the chapter principally is the consideration of the options available to affected parties to obtain review of the decision whether to provide products or services through operation of a Government commercial or industrial activity with Government employees or through contracting with a private, commercial business. Reviews of related decisions and matters pertaining to the legality of agency action under federal personnel laws and regulations are considered only in so far as they have an impact on the Government make-or-buy decision.

Reliance on Private Enterprise Historical Background

In a democratic free enterprise system, the Government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on competitive private enterprise to supply the products and services it needs.⁴

With this statement of policy the Office of Federal Procurement Policy (OFPP), on March 29, 1979, issued the revised Office of Management and Budget (OMB) Circular A-76, entitled "Policies for Acquiring Commercial or Industrial Products and Services for Government Use".⁵ The Circular established the policies and procedures to be used to determine whether needed commercial or industrial type work should be done by contract with private sources or be done in-house using Government facilities and personnel.⁶

The policy of Governmental reliance on the private sector has been a part of procurement doctrine for approximately 25 years. During that time the rhetoric used to state the policy has changed little. Yet the implementation program has undergone a relentless and sometimes turbulent, process of evolution. This process has been influenced by a diverse set of conflicting forces. Not infrequently, the forces reflected the diametrically opposing positions of the various proponents.

The most clearly identifiable forces shaping the policy have been the Congress and the agencies and departments of the Executive branch. However, the basic premise dates back to Adam Smith's treatise "On Public Opulence", written in 1764, and his greater known work, "An Inquiry into the Nature and Causes of the Wealth of Nations", published in 1776.⁷

According to Adam Smith's "system of natural liberty", the sovereign has only three duties. These are:

First, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions which it can never be for the interest of any individual or small number of individuals to erect and maintain, because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society.⁸

Throughout the history of this country there have always been advocates of a policy against Government interference or competition with the free, private enterprise system. Alexander Hamilton was an early supporter of Adam Smith's theory of capitalism. Like Smith he believed that government had its place, and it was not in the marketplace. Furthermore, since competition produced progress, it was assumed that private enterprise could always produce goods more efficiently and more economically.⁹

Despite its proponents the laissez-faire theory of capitalism has not always been followed in the United States. Nor have Government bureaucrats enthusiastically endorsed the policy of a traditional role for Government. After the turn of the century circumstances unavoidably led to "temporary" frustration of that policy in the area of Government competition with private commercial or industrial concerns. Out of necessity several industrial activities were initiated during World War I, principally within the Department of Defense. However, following the war many of these programs and activities were not terminated as originally planned. The same sequence of events occurred during and after World War II, within DOD and the Civilian agencies, and even gained some measure of acceptability as necessary incidents of Government operation.¹⁰ Some would say the camel had followed his nose into the tent.

This build-up had not gone completely unnoticed, and the necessity of the practice was not universally accepted. During the period from 1932 until 1955 numerous Congressional hearings were held to examine the situation.¹¹ It was determined that by 1955 the Federal Government had become the largest lender and the largest borrower, the largest landlord and the largest tenant, the largest holder of grazing and timberland, the largest owner of grain, the largest warehouse

operator, the largest shipowner, and the largest truck fleet operator.¹² The concern was expressed that Federal agencies had entered into so many business-type activities that they constituted a real threat to private industry and imperiled the tax structure.¹³ This recognition led to varied and periodic attempts to curtail and reverse the trend.

The first governmental effort to formulate a formal policy of reliance on the private sector for production and supply of Government needs was contained in the report of the Special Committee of the House of Representatives in 1933.¹⁴ That report recommended creation of a standing committee on Government competition to oversee dismantlement or liquidation "of all such bureaus, subdivisions, or agencies . . . competing with private trade, commerce, finance, industry, or the professions, the operation of which are not in the public interest."¹⁵ The recommendation was never adopted.

Following that report in 1933 there were similar reports and recommendations by the Senate and House Appropriations Committees, the House Armed Services Committee, the Senate and House Committees on Government Operations, and the Senate Select Committee on Small Business.¹⁶ In addition, there were a number of pieces of legislation introduced in the House and in the Senate for the purpose of legislating a definite policy in this area.¹⁷ None of these succeeded in passing both houses, principally as a result of lobbying efforts by the Executive branch. As a result, Congress has never adopted a comprehensive statement of policy on Government competition with private enterprise, and the responsibility for development and implementation has been left to the Executive branch.

Within the Executive branch, the Department of Defense was one of the agencies most closely scrutinized and criticized by the early Congressional

investigations. As a result, in September 1952, DOD outlined a policy of avoiding competition with private enterprise. Department of Defense Directive 4000.8 established a policy against retention and continued operation of competing facilities where requirements could be met effectively and economically by other existing facilities of the military or by private commercial sources. It required the military departments to survey and justify the continuation of in-house commercial and industrial activities and restricted the establishment of new facilities.¹⁸

This limited, departmental effort by DOD was followed by the first brief, public statement of Executive sentiment on the matter by President Dwight Eisenhower in his first budget message on January 21, 1954. He stated:

This budget marks the beginning of a movement to shift to State and local governments and to private enterprise Federal activities which can be more appropriately and more efficiently carried on in that way.¹⁹

The gist of the entire message was that progressive economic growth would be fostered by continuing emphasis on efficiency and economy in Government, reduced Government expenditures, reduced taxes, and a reduced deficit. It did not deal extensively with Government competitive practices. However, his statement contained references to specific programs for elimination of Government manufacturing operations for tin and rubber.²⁰

The policy announced by President Eisenhower was adopted in the Bureau of the Budget Bulletin No. 55-4, dated January 15, 1955. The Bulletin was addressed to the heads of executive departments and establishments. It provided, in part, as follows:

It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business

channels. Exceptions to this policy shall be made by the head of any agency only where it is clearly demonstrated in each case that it is not in the public interest to procure such product or service from private enterprise.²¹

BOB Bulletin No. 55-4 was the first of a series of statements of Executive branch policy in this area. The program of eliminating or reducing competitive operations of Government was expanded and updated by other bulletins. Bulletin No. 57-7 was issued on February 5, 1957, and Bulletin No. 60-2 was issued on September 21, 1959. The Bureau of the Budget issued Circular No. A-76 on March 3, 1966, and it was revised in 1967.²²

During 1973 and 1974 Congressional hearings were held on the various proposals of the Commission on Government Procurement created in November, 1969, by Public Law 91-129.²³ The Commission's final report had been filed with Congress in December, 1972, and had strongly recommended a tougher implementation program to achieve consistent and timely Government application of the basic policy of the Circular.²⁴ In response to this recommendation Congress enacted Public Law 93-400 in August, 1974.²⁵

Public Law 93-400 created the Office of Federal Procurement Policy within the Office of Management and Budget and the Executive Office of the President. Its function was to provide leadership in Government-wide procurement matters and to be responsive to the Congress. One of OFPP's priority programs was the improvement of the implementation of Circular No. A-76.²⁶

During the period of time in which OFPP was grappling with the problems of improving implementation of Circular No. A-76, other events took place which also impacted on the Circular A-76 program. In July, 1976, President Gerald Ford initiated his Presidential Management Initiatives (PMI) program.²⁷ Its goal was the improvement of Executive branch management, including furthering the policy of

reliance on the private sector. Under this program each agency was expected to identify at least five in-house functions that were to be reviewed for the potential of increasing the agency's reliance on private enterprise. The real objective of the program was unclear. Agencies were uncertain whether the object was to convert five activities to contract that otherwise qualified for continued in-house performance, or whether the purpose was to hasten compliance with the review and reporting requirements of Circular A-76.

The Office of Management and Budget also took steps to ensure compliance with the Circular's implementation program. It issued a Budget Procedures Memorandum in August, 1976, requiring the OMB program division staff to review agency justifications for in-house work approved under criteria other than cost.²⁸ Attention was to be given to new starts to ensure that they received the special review and approval required by Circular A-76.

On November 17, 1976, OMB went one step further by issuing OMB Circular A-113. That circular prescribed general guidance and responsibilities for the preparation, submission and execution of management plans by federal agencies. Each management plan was to briefly describe the actions, taken and proposed, with respect to implementation of Circular No. A-76.²⁹

At about this same time the Office of Federal Procurement Policy issued Transmittal Memorandum No. 2 to A-76, dated October 18, 1976, which provided retirement and insurance costing factors for Government civilian personnel services.³⁰ This factor was set at 24.7 percent of payroll for retirement. The factors for health insurance and life insurance were set at 3.5 percent and 0.5 percent of payroll, respectively. Following the uproar of criticism from the agencies and the Federal employee unions alleging that such factors would make it impossible for the in-house estimate to be lower, Transmittal Memorandum No. 3

was issued on June 13, 1977, to amend the cost factor for computing retirement costs of civilian personnel services, pending further review.³¹ The cost factor established as an interim figure was 14.1 percent of payroll. While this was still a considerable jump from the 7 percent factor in use before 1976, the compromise abated the criticism until something else could be done.

The PMI program and Circular A-113 also had not been well received or understood by the agencies. After reconsideration, on March 3, 1977, OMB had suspended the reporting requirements of Circular A-113 and announced that it would undertake a comprehensive review of current management improvement policies in the various circulars.³² On June 13, 1977, in conjunction with the compromise adjustment of the retirement cost factor to 14.1 percent, the quota requirements of the PMI program were dropped. The Administrator of OFPP and the Director of OMB also announced a comprehensive review of OMB Circular A-76 and its implementation.³³

The review was to incorporate three basic principles. These were:

- (1) Contracting out should not include policymaking and other inappropriate functions;
- (2) Procedures must be consistent, fair, and equitable, with primary emphasis on stability and predictability for the worker;
- (3) Quotas and other arbitrary approaches are not acceptable methods for implementing the policy.³⁴

The Office of Federal Procurement Policy and the Office of Management and Budget created a task group to conduct the review. This task group was to consider three aspects of the program in its study. These were listed as follows:

- (a) Functions which are necessary and appropriate exceptions to contracting out and criteria for assessment;
- (b) Cost comparison methodologies and factors used in such comparisons;
- (c) Agency review cycles for transferring functions to and from in-house³⁵ and contracted performance, as well as appeal procedures.

The Transmittal Letter announcing the comprehensive review and adjusting the cost factor solicited input and suggestions from interested parties. On November 21, 1977, a number of proposed changes to Circular A-76 were published for comment.³⁶ A draft revision was published for comment on August 22, 1978.³⁷ During this period of time numerous statements with suggestions and criticism were received by OFPP.³⁸ After consideration by OFPP and OMB, the final version was issued on March 29, 1979.³⁹

As the policy statement of the revised Circular indicates, private enterprise, based on the profit theory, is the foundation of our commercial system.⁴⁰ However, like Adam Smith, the drafters noted that certain functions should in all cases be performed by the sovereign, and others are left to the Government for reasons of pure economy.⁴¹ It is the dividing line between governmental and commercial functions and the procedures for balancing the economies of the operations which make up the real statement of the policy.

CHAPTER TWO
EVOLUTION OF THE POLICY OF RELIANCE ON
THE PRIVATE SECTOR

Policy and Exceptions

The policy statement in the revised OMB Circular No. A-76 is stated in terms of three, co-equal precepts.⁴² It provides for adherence to the philosophy of reliance on the private sector, but it tempers that principle with the recognition that certain functions, governmental in nature, must be performed in-house and that others may be performed in-house if a cost comparison indicates such performance would be more economical.

First Precept - Reliance on Private Sector

Under the first precept, the Circular provides that where private sources are available, they should be considered first to provide the commercial or industrial goods and services needed by the Government to act on the public's behalf.⁴³ This expression has been the major part of the policy statement on this subject since 1955. It was announced by the Executive branch in BOB Bulletin No. 55-4. That bulletin provided in pertinent part:

It is the general policy of the administration that the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels.⁴⁴

Unlike the current Circular, Bulletin No. 55-4 contained no exclusion for governmental functions. The only recognized exception to the policy was one allowing in-house performance in those situations in which the head of an agency determined that commercial contracting would clearly not be in the public interest.⁴⁵ The term "public interest" was not specifically defined; however, the Bulletin indicated that relative cost was a factor to be considered "in those cases where the agency head concludes that the product or service cannot be purchased on a competitive basis and cannot be obtained at reasonable prices from private industry."⁴⁶

While the consideration of relative cost under the Bulletin could be viewed as the forerunner of the cost studies under the third precept of Circular No. A-76, subsequent interpretation of the policy by the Bureau of the Budget (BOB) indicated that the decision to continue or discontinue an activity did not depend on whether the product or service could be produced more cheaply by private contract. It was stated that the apparent cost of a particular product or service would not be a deciding factor if adequate competition existed.⁴⁷

The reasons for the policy decision to require contracting "where adequate competition exists" without actual comparison of costs to the Government were stated in a memorandum from the Director of the Bureau of the Budget to the President during October, 1956. These were as follows:

- (1) The cost of Government operations are not comparable with corresponding business costs. The Government, for example, pays no income taxes and operates its own tax-free facilities, thereby keeping costs down.
- (2) Government accounts are not kept in the same manner as business accounts, so that a comparison of the operating costs of Government versus business, for example, is not only difficult but often misleading.
- (3) Above all, the decision whether to continue or discontinue a Government activity solely on an apparent cost basis runs counter to our concept that the Government has ordinarily no right to compete in a private enterprise economy.⁴⁸

Based on the Executive branch interpretation, the policy under Bulletin No. 55-4 was essentially one of absolute elimination of all Government competition. While the Eisenhower administration campaigned in support of economy and efficiency of government, cost comparisons were not treated as a realistic measure of economy. It was taken for granted that competition in the marketplace would insure the lowest fair price for needed goods and services. In essence, cost factors were considered mutually exclusive with realization of the policy of reliance on the public sector.⁴⁹

Bulletin No. 55-4 was issued as a temporary directive. It was followed by two additional bulletins on the same subject. Although the basic policy statement in favor of commercial contracting by the Government remained the same, the procedures and considerations for decision-making were systematically modified in response to experience and Congressional inputs.

Bulletins No. 57-7 and 60-2 contained essentially identical expressions of virtually absolute reliance on the private sector.⁵⁰ In support of that statement Bulletin No. 57-7 further refined the interpretation contained in the BOB memorandum by providing that commercial prices were to be considered reasonable when the price to the Government was not greater than the lowest price obtained by other purchasers, taking into consideration volume of purchases and quality of the products or services.⁵¹

Bulletin 60-2 took the implementation of the policy one step further. It eliminated the vague "public interest" exception used in the earlier bulletins. In its place Bulletin No. 60-2 provided as follows:

Because the private enterprise system is basic to the American economy, the general policy establishes a presumption in favor of Government procurement from commercial sources. This has the

two-fold benefit of furthering the free enterprise system and permitting agencies to concentrate their efforts on their primary objectives⁵²

In spite of the general presumption in favor of contracting, the Bulletin for the first time specifically recognized compelling reasons which might make it necessary or advisable for the Government to provide products or services for its own use. The compelling reasons, or exceptions to the general policy, were national security, relatively large and disproportionately higher costs, and clear unfeasibility.⁵³

Bulletin No. 60-2 made it clear that national security as a compelling reason for continued Government ownership and operation was not meant to be all inclusive for products and services with restrictive classifications. It was specifically noted that commercial contractors, operating under proper security clearances and safeguards, had been, and would continue to be, essential to the national defense effort. Therefore, this exception was to be used only in those instances when an activity could not be turned over to private industry. These activities were to include, but were not necessarily limited to, functions which must be performed by Government personnel to provide them with vital training and experience for maintaining combat units in readiness.⁵⁴ This exception established the precedent for the second precept in Circular No. A-76.

With respect to the exception for continuation on the basis of relatively large and disproportionately higher costs, greater emphasis was placed on the comparability of the respective costs.⁵⁵ However, Bulletin No. 60-2 did not prohibit procurement from more costly commercial sources, particularly if such procurements were found to foster and maintain the development of commercial production capabilities to meet ultimate governmental and nongovernmental needs at potentially lower costs.⁵⁶ The Bulletin also recognized that pertinent economic

and social aspects of public policy were to be considered, even though the policy was not the immediate concern of the agency or agency official directly responsible for the particular activity being evaluated.⁵⁷

The third criterion for continuation of commercial and industrial activities was clear unfeasibility. This exception to the general policy was a hodge-podge and was to be used when the product or service was an integral function of the agency's basic mission, or was not commercially available, or was administratively impractical to contract commercially.⁵⁸ Commercial unavailability was defined as unavailability at the time of the evaluation or at any time in the foreseeable future because of the Government's unique or highly specialized requirements or geographic isolation of the installation.⁵⁹

Throughout the early to mid-sixties the presumption in favor of commercial contracting for goods and services by the Government remained part of the Government-wide procurement policy. However, the implementation of the policy at the operational level of the agencies showed mixed success. Congressional involvement in the problems was intensified by protests from federal employee unions that federal agencies, particularly DOD, were using contractor personnel for work which should have been performed by Government employees. In addition, it was alleged that the work was being contracted at a higher cost than if performed in-house.⁶⁰

Following the Congressional interest in the matter the General Accounting Office (GAO) made a study of a number of Government technical services contracts.⁶¹ One of the first of these was an Air Force contract for engineering services at Fuchu Air Base, Japan. In that case it reported that substantial savings would be possible by converting the work to performance by Civil Service employees.⁶² The Civil Service Commission reviewed the same contract and

concluded that it was a form of procurement of services proscribed by Civil Service laws and regulations.⁶³ The Department of Defense conducted its own study of the matter and finally agreed with both the GAO and the Civil Service Commission.⁶⁴ In June, 1965, the Secretary of Defense announced a program to convert the services of approximately 10,500 contract personnel to performance by DOD civilian employees.⁶⁵

The conversion of such a large number of contract positions to Government employees, even though undertaken over a period of time, had a serious effect on commercial firms involved. The impact was absorbed primarily by small businesses. For this reason it was felt that private industry and the policy presumption of the Bulletin in favor of commercial contracting had suffered a serious blow. Serious questions were raised and debated on whether Bulletin No. 60-2 should even apply to support services.⁶⁶

Out of the controversy and debate came change. On March 3, 1966, BOB Bulletin No. 60-2 was cancelled and replaced by BOB Circular No. A-76. In issuing the new circular the Bureau of the Budget outlined seven objectives to be gained by the stylistic change from a bulletin to a circular and the more substantive program changes. These were as follows:

- (1) To restate the policy in a Circular because a bulletin was generally considered to be a less permanent directive;
- (2) To provide more complete and explicit guidelines to agencies for applying the policy;
- (3) To establish a clearer distinction in applying the policy to new starts and existing activities;
- (4) To replace the standard of relatively large and disproportionately higher costs with a more precise set of cost guidelines;
- (5) To provide for a study of procurements from commercial sources when it appears that costs from such sources were exorbitant;
- (6) To eliminate detailed inventory and statistical reports sent to BOB because the principal responsibility for applying the policy rested with each agency; and

(7) To provide for⁶⁷ proper coordination of the policy with other related directives.

While Bulletin No. 60-2 based the policy of Government procurement from commercial sources on the desirability of supporting the private enterprise system, Circular A-76 limited that general policy to circumstances in which it would be more economical to use the private sector. This could be viewed as another victory for the Federal employee unions, since it clearly marked the end of a nearly absolutist policy and gave Government employees the chance to "compete" to maintain their jobs.⁶⁸ As enumerated at the time of issuance, the Circular's objectives were to assure that Government programs were performed with maximum efficiency, effectiveness, and economy, as well as to maintain the Government's policy of relying on private enterprise.⁶⁹

While the essential elements of the policy statement remained unchanged, the Circular underscored its scope and general applicability by mandating that no Executive agency would initiate a "new start" or continue the operation of an existing commercial or industrial activity "except as specifically required by law or as provided in this Circular."⁷⁰ This was stronger wording than the bulletins used. Arguably this language preserved the generality of the policy while recognizing its place in the legal hierarchy of laws and regulations. If an activity was not established by statute, the agency was required to justify its existence under the Circular's exceptions to the policy in favor of commercial contracting.

Circular A-76 provided five exceptions under which the Government could provide a commercial or industrial product or service for its own use. These were as follows:

(1) Procurement of a product or service from a commercial source would disrupt or materially delay an agency's program;

- (2) It is necessary for the Government to conduct a commercial or industrial activity for purposes of combat support or for individual and unit retraining of military personnel or to maintain or strengthen mobilization readiness;
- (3) A satisfactory commercial source is not available and cannot be developed in time to provide a product or service when it is needed;
- (4) The product or service is available from another Federal agency;
- (5) Procurement of the product or service from a commercial source will result in higher cost to the Government.⁷¹

From a numerical standpoint the exceptions to the general policy were increasing. Bulletin No. 55-4 and Bulletin No. 57-7 contained a single, broad exception based on "public interest." This was expanded to three exceptions under Bulletin No. 60-2. Circular No. A-76 increased the number to five. Despite the greater number of exceptions, the expansion did not necessarily reflect a retreat from the principle contained in the policy statement itself which remained unchanged.

The exception for disruption and delay under the Circular reversed the position taken in Bulletin No. 60-2 on "integral functions". Under the Bulletin, activities which were an integral function of an agency's basic mission were exempt as "clearly unfeasible to procure from private enterprise."⁷² The Circular required demonstration of actual, adverse impact on accomplishment of the agency's mission.⁷³

On the other hand, Circular No. A-76 added an exemption for goods or services obtainable from another Federal agency,⁷⁴ and it reduced the standard for cost justification by requiring a strict comparison.⁷⁵ In-house performance could be justified by a showing of "higher cost" for contracting instead of the "large and disproportionately higher costs" required by Bulletin No. 60-2. Comparing these changes with the other innovations, such as a flexible cost differential favoring contracting,⁷⁶ commentators expressed mixed opinions on whether the Circular would result in more or less contracting.⁷⁷ In fact, reports made as late as 1978

showed implementation of the Circular was not being readily undertaken by the Executive agencies.⁷⁸

From the issuance of BOB Circular No. A-76 in 1966 to the issuance of the current revision in 1979, the policy statement and exceptions remained unchanged. However, the turmoil over President Ford's PMI program and the promulgation of standard cost factors combined with a change of presidential administration prompted a move to a fresh approach. The result was the restructuring of the policy statement from the single statement of reliance on the private sector to three, co-equal precepts recognizing the category of governmental functions and elevating cost considerations to a clearer position of prominence.

Second Precept - Perform Governmental Functions In-house

The significance of the second precept which provides that governmental functions must be performed by Federal employees is not readily apparent from the Circular itself. It merely provides that the implementation provisions of the Circular do not apply to governmental functions.⁷⁹ However, the supplementary information in the Federal Register pertaining to the new Circular makes it clear that governmental functions are not subject to the inventory or review requirements of the Circular.⁸⁰ Once an activity is identified as a governmental function it is outside the coverage of the Circular. More importantly, this determination is made by the agency and is not subject to the appeal process of the Circular.⁸¹ These activities are not required to be publicly identified, making it difficult to contest the decisions through other means.⁸²

As a practical matter, the term "governmental function" provides the agencies with a tremendous "loophole". It is defined in very general terms, involving three categories of activities. These are the discretionary application of Government authority, monetary transactions and entitlements, and in-house core capabilities.⁸³

Discretionary application of Government authority covers a wide range of functions. Examples include investigations, prosecutions and other judicial functions; management of Government programs, the Armed Services and foreign relations; direction of Federal employees; regulation of the use of space, the oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce.⁸⁴

While this is an extremely broad category, the Circular merely delineated the matters previously considered outside the scope of the policy because they involved "normal management responsibilities." The bulletins excluded such activities from the definition of commercial or industrial activities.⁸⁵

The category of "monetary transactions and entitlements" is relatively narrow and is not the subject of serious disagreement or objection. On the other hand, including "in-house core capabilities" within the definition of governmental function could be viewed as a carte blanche for agency heads to continue some activities otherwise clearly covered by the Circular. Since governmental functions are those which "must be performed in-house," the Circular's discussion of this category is inconsistent and contradicts the overall approach.⁸⁶ This is exemplified by the provision that "requirements for such services beyond the core capability which has been established and justified by the agency are not considered governmental functions."⁸⁷ In fact, even this statement is in error since the determination of what are "core capabilities," like the more general determination of what are governmental functions, does not have to be publicly justified.⁸⁸

Third Precept - Government Economy and Efficiency

The third precept of the policy statement elevates cost considerations to the same level as reliance on the private sector. There is an apparent incon-

sistency in this approach for the Circular. On one hand the first precept states that private enterprise should be "looked to" first in order to satisfy the Government's needs. On the other hand, the third, co-equal precept provides that cost comparisons should be used to decide how the work will be done. It can hardly be said that the federal government is relying on private enterprise if commercial firms must compete with Government for award of a contract.⁸⁹

The inter-relationship of the three precepts was explained by Mr. Bowman Cutter during Congressional hearings on legislation concerning reductions in personnel ceilings following contracting-out under Circular No. A-76.⁹⁰ He paraphrased the policy as follows:

Specifically, governmental functions should be performed by Federal employees while products and services that can only be provided in the private sector should be obtained by contract.⁹¹ In all other cases, cost effectiveness should be the deciding factor.

Exceptions to Policy of Reliance on Private Enterprise

This interpretation of the policy behind the Circular is not entirely consistent with the third precept. The language in the Circular takes into account the existence of exceptions, apart from the exclusion of governmental functions, which do not require use of a cost comparison.⁹² The exceptions to the general policy found in the revised Circular are: (1) no satisfactory commercial source available; (2) national defense; and (3) higher cost. Of these three, only the third requires a cost comparison.⁹³

Under the first exception, in-house performance can be authorized without a cost study if there is no private commercial source capable of providing the product or service needed, or if use of a private commercial source would cause an unacceptable delay or disruption of an essential agency program.⁹⁴ This exception incorporates the first and third exceptions of the earlier versions of the Circular.

However, the revised Circular requires delay or disruption of an "essential agency program."⁹⁵ The previous versions applied to any program conducted by an agency under its mission.⁹⁶

With respect to non-availability of a commercial source, the revised Circular establishes more detailed requirements for identification of potential bidders. The mechanics of demonstrating that there is no private commercial source available include, as a minimum, placing at least three notices of the requirement in the Commerce Business Daily over a 90-day period. In the case of "urgent requirements", publication in the Commerce Business Daily can be reduced to two notices over a 30-day period. Agencies are also directed to obtain assistance from the General Services Administration, Small Business Administration, and the Domestic and International Business Administration in the Department of Commerce.⁹⁷

In order for use of a commercial source to be unsatisfactory because it would cause an unacceptable delay or disrupt an agency program, the agency must document the factors upon which it is relying for the exception. This includes the cost, time and performance measures contributing to the delay or disruption. Disruption must be shown to be of a lasting or unacceptable nature, beyond the normal inconvenience caused by transition to commercial contract.⁹⁸

Specifically excluded from valid consideration is the fact that an activity involves a classified program or is part of an agency's basic mission, or that there is a possibility of a strike by contract employees.⁹⁹ In addition, urgency, by itself, is not an adequate reason for starting or continuing a Government commercial or industrial activity. It must be shown that commercial sources are not able to provide the product or service when needed.¹⁰⁰

The exception for commercial or industrial activities necessary to the national defense is divided into two parts. The first part applies only to activities operated by military personnel. Justifications under this exception must demonstrate that the activity or the military personnel assigned could be utilized in a "direct combat support role"; that the activity is essential for training in military skills; or that it is needed to provide the military personnel appropriate work assignments for career progression or a rotation base for overseas assignments.¹⁰¹

The second part of the national defense exemption allows continuation of depot or intermediate level maintenance operations with military or civilian personnel. The specific criteria for justification of such functions is left with the Secretary of Defense.¹⁰² The rationale for this exemption is based on the recognition of the need for "a ready and controlled source of technical competence and resources necessary to meet military contingencies."¹⁰³

Since this provision essentially allows maintenance of core capabilities it is unclear why it could not come within the total exclusion for governmental functions. The same logic applies to the first part of the national defense exemption, since strictly military operations necessary for the national defense certainly "must be performed in-house due to a special relationship in executing governmental responsibilities."¹⁰⁴ One possible explanation is the desire to keep such activities within the provisions of the Circular requiring identification and inventorying. If that is the case it is unclear why the same was not true for the "in-house core capabilities" included as governmental functions.¹⁰⁵

The third exception is the one area in which a great change has taken place with the revision of Circular A-76. In-house performance of commercial or industrial activities on the basis of higher cost involves the use of cost comparisons. Cost comparison guidelines were rather general in the previous Circular,

permitting a wide divergence in practice among the agencies.¹⁰⁶ The revision attempts to establish basic principles to be followed, including the use of firm bids or proposals to establish commercial costs;¹⁰⁷ recognition of overhead and indirect costs for Government operations;¹⁰⁸ standard cost factors for Government employee fringe benefits and administration of contracts;¹⁰⁹ and cost differentials which must be met before converting in-house activities to contracts or contracts to in-house new starts.¹¹⁰

Services from Other Agencies

Unlike the previous Circular and the bulletins, the revision contains no policy exception for services obtainable from another agency.¹¹¹ Instead, the Circular makes specific provision that excess property and services available from other federal agencies should be used in preference to new starts or contracts, unless the needed product or service can be obtained more economically in the private sector. However, when a commercial or industrial activity operated by an agency primarily to meet its own needs has excess capacity, that capacity can be used to provide products or services to other agencies.¹¹²

What this seemingly contradictory language means is that a hierarchy of preference is established by the Circular. The highest preference is given to products or services which are excess to another federal agency operating a commercial or industrial activity in accordance with the Circular to meet its own needs. If a formal program for managing excess capacity has been established, capacity that has been reported as excess may be used by other agencies without further justification or cost comparison.¹¹³

Circular A-76 makes it clear that it is not intended that agencies create or expand capacity for the purpose of providing commercially available products or services to other agencies. It requires that support to other agencies be strictly

from excess. Agencies are not authorized to expand a commercial or industrial activity which is providing products or services to other agencies. When the supplier agency's needs increase the excess vanishes, and the user agency must be informed, with sufficient notice to arrange alternate sources, that the support will be terminated unless some other exception to the Circular's application would allow continuation and possible expansion.¹¹⁴

The second level on the scale of preferences would be commercial sources under the general terms of the Circular. However, there are federal agencies which operate commercial or industrial activities for the primary purpose of providing a product or service to other federal agencies. Examples given by the Circular include the Federal Data Processing Centers or the Office of Personnel Management training centers. These sources, like any other commercial or industrial activity, are required to be inventoried and reviewed under the Circular. Unless cost comparison justifies continued existence, these activities seemingly would be terminated. Circular A-76 requires such reviews and cost comparisons of these special supplier activities to be completed not later than October 1, 1981. If continued Government operation of the activity is approved, agencies may use the products or services provided by the supplier with no further justification.¹¹⁵

If expansion of the supplier activity is necessary to satisfy demand, it must be justified as an "expansion" or "new start" under the terms of the Circular. The Circular allows the justification for approval of such an expansion to be based on the entire workload of the supplier, including work for other federal agencies. This may be contrasted with the expansion requests for agencies supplying primarily their own needs. In those cases only the supplier agency's needs may be used to justify expansion.¹¹⁶ Finally, the lowest priority would be given to a "new start" by the user agency to supply its own needs. In that case the general provisions and biases of the Circular for cost comparisons would be applied.

Conclusions

From this discussion of the historical development of the policy of reliance on private enterprise, and the exceptions to that policy, some conclusion may be drawn. The policy statement itself has changed very little since the issuance of BOB Bulletin No. 55-4 in 1955. The policy of the Executive branch, for whatever political or economic reasons, continues to be to "look to" private enterprise to supply the needs of Government. The changes that have occurred in this area have necessarily been subtle, and it appears uncontroversial. It is difficult for any of the interest groups to argue against economy and efficiency, or to argue that coining money and collecting taxes, *among other things*, should not be performed by Government employees. The criticism has not been over the policy. Rather the criticism has centered on the implementation by the Executive agencies. Most complaints focus on the inconsistency and unpredictability of the decision-making process.¹¹⁷

CHAPTER THREE

SCOPE AND DEFINITIONS

Application to Commercial or Industrial Activities

In addition to the exclusion for governmental functions, which is part of the second policy precept, there are other exclusions and limitations contained in OMB Circular No. A-76 which limit the scope of its application. Under its terms it applies to commercial or industrial activities.¹¹⁸ A "Government commercial or industrial activity" is defined as one which is operated and managed by a Federal executive agency and which provides a product or service that could be obtained from a "private source."¹¹⁹

A "private source" or "private commercial source" is a private business, university, or other non-Federal activity, located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico. In addition, the source must provide a commercial or industrial product or service required or "needed" by Government agencies.¹²⁰

The Circular contains a representative listing of commercial and industrial activities as an Appendix.¹²¹ The list of activities covers a wide range of functions and obviously is intended to demonstrate the expansiveness of the term. In addition, it is noted that the list is for the purpose of clarification by example. It is not meant to be comprehensive and should not be viewed as such.

The definition of "Government commercial or industrial activity" and the categorical list contained in the 1979 revision cover a somewhat broader range of activities than the definition in the earlier versions. Bulletin No. 55-4 defined the concept of a "commercial activity" to which its policy applied as one available "through ordinary business channels."¹²² Those products or services which were not available from an existing commercial business were not "commercial" in nature.

The standard for determining whether a product or service could be procured through ordinary business channels was whether the activity was listed in the Standard Industrial Classification Manual.¹²³ The alternative method was reliance on "ordinary business practice."¹²⁴ The first mechanism was totally objective and independent of agency interpretation or discretion. But the "business practice" method of identifying commercial activities relied entirely on the experience and judgment of the decision-maker.

This use of the availability from commercial sources as the definition of commercial and industrial activities, instead of the nature of the work itself, was continued in Bulletin No. 57-7.¹²⁵ However, Bulletin No. 60-2 altered the treatment somewhat. While the definition of commercial-industrial activities remained essentially the same, commercial unavailability was treated as an exception to the policy.¹²⁶ By making it an exception, the Circular shifted the burden of proof to the agency which sought to avoid application of the Bulletin's new presumption in favor of commercial contracting.¹²⁷

With the transition from Bulletin No. 60-2 to BOB Circular No. A-76 in 1966, this treatment did not change.¹²⁸ The Circular, however, did amplify the procedures to be taken by agencies to find satisfactory commercial sources. It provided that the agencies' efforts should be supplemented by requests for

assistance from the General Services and Small Business Administrations or the Business and Defense Services Administration. In addition, it indicated that mere urgency of a requirement was not sufficient to justify in-house performance of a commercial or industrial activity. The Circular also required evidence that commercial sources were not able to provide a product or services when needed, and that the Government was able to provide it.¹²⁹

Under the current version of Circular No. A-76, commercial availability or unavailability is not a part of the definition of "Government commercial or industrial activities."¹³⁰ The focus now is entirely on the nature of the work and not whether private business presently performs the same type of work. Of course, unavailability of a satisfactory commercial source is an exception allowing in-house performance,¹³¹ but the other provisions of the Circular regarding inventories and periodic reviews continue to apply.¹³²

Products and Services for the Government's Own Use

The 1979 revision also eliminated another limitation on the scope of the policy statement. Beginning with the earliest versions of the Bureau of the Budget bulletins, the policy statement had included only those products or services needed by the Government "for its own use." The specific treatment of this limitation changed with the various directives.

Bulletin No. 55-4 defined "activities . . . for its own use" as those activities of producing a service or product "primarily for the use of the Government (whether the same agency or other agencies)"¹³³ Included were those activities through which some portion of the product or service was sold or given to the public. Similarly, it included activities which provided a product or service for the use of a Government agency in its official duties, even though the agency was

engaged in providing a service to the public.¹³⁴ Conversely, it excluded those activities producing a product or service primarily to be sold or given to the public, such as power from the Tennessee Valley Authority.

The number of types of activities excluded as not being for the Government's own use was increased by Bulletin Nos. 57-7 and 60-2. These added the exclusion for activities "primarily for the employees of the agencies", for example, providing quarters for rent to employees at remote locations.¹³⁵ Notwithstanding this fact Bulletin No. 57-7 stated that the fact products or services provided directly to the public were excluded did not relieve the agencies from their separate responsibility to constantly review and reevaluate those activities on the basis of actual need.¹³⁶

While the statement on separate reviews of activities providing products or services to the public was not included in Bulletin No. 60-2, it reappeared in BOB Circular No. A-76.¹³⁷ It also appeared in the 1967 revision of the Circular.¹³⁸ The exact purpose of the statement is unclear. It did not extend the policy of the Bulletin or the Circular to those separate reviews. It arguably could have reflected a feeling that those activities were essentially part of the basic function of government, not properly performed by contract. The similarity of this interpretation to the treatment of governmental functions in the current Circular gives some support to the argument.¹³⁹

Circular No. A-76 now does not specifically limit the current policy to items for the Government's own use. It provides that where private sources are available, they should be utilized to provide the commercial or industrial goods and services "needed by the Government to act on the public's behalf."¹⁴⁰

The only remaining vestige of the "use" limitation is found in the treatment of products or services obtainable from other federal agencies. Under the separate

treatment given this topic, a commercial or industrial activity operated by an agency "primarily to meet its own needs" may provide the excess capacity to other agencies.¹⁴¹

The reference to agency needs in this context is ambiguous. There is no specific exclusion in this area for products or services provided to the public which is similar to those found in the previous directives. An agency's needs depend on its function or mission; therefore, those needs could include products or services provided directly to the public. Such an interpretation eliminates entirely the restriction placed on the application of the policy statement since 1955. It thereby expands the scope of the Circular to those commercial and industrial activities providing products or services directly to the public, provided those activities do not qualify as governmental functions.

Specific Activities Excluded

Despite the breadth of potential coverage, especially in the area of service activities, the Circular specifically excludes certain specific activities. For example, it excludes "consulting services of a purely advisory nature relating to the governmental functions of agency administration and management and program management."¹⁴² It further provides that assistance in the management area may be provided either by Government staff organizations or from private sources, as deemed appropriate by the executive agencies.¹⁴³

The use of consulting services is governed by OMB Circular No. A-120 (April, 1980).¹⁴⁴ That directive, with reference to the policy statement of Circular No. A-76, distinguishes consulting services from both governmental functions and commercial or industrial activities, as those terms are used in Circular No. A-76. It further provides that consulting services should be provided by Government staff

organizations or by private sources, as determined by the executive agencies in accordance with the guidance contained in Circular No. A-120.¹⁴⁵

Circular No. A-76 provides that major systems acquisitions also are governed by another circular, OMB Circular No. A-109.¹⁴⁶ Interestingly enough, it does not state that OMB Circular No. A-76 does not also apply. Instead it says that reliance on the private sector is one of the general policies contained in Circular No. A-109 to ensure competitive consideration of all alternatives to determine the best method of satisfying an agency mission need.¹⁴⁷

The application of the policy and provisions of Circular No. A-76 to automatic data processing (ADP); research and development (R&D); and Government-owned, contractor-operated (GOCO) facilities is somewhat confusing and complicated. It is confusing because the treatment of each is different and the applicable provisions are spread throughout the Circular and Transmittal Memorandum No. 4. It is complicated because application has been further limited by actions taken by Congress which apply only to certain agencies.

Automatic data processing is within the definition of "Government commercial or industrial activities".¹⁴⁸ It also is listed as a "representative" commercial or industrial activity in Appendix A of the Circular. Yet ADP is one of the major Government-operated services provided to other federal agencies through the ADP sharing program operated by GSA. To the extent GSA has a reported excess of such services, they may be used by other agencies without justification under the Circular.¹⁴⁹ In other words, the cost comparison requirements imposed by the Circular do not apply to ADP services provided by GSA, so long as that operation continues to maintain excess capacity.

The revision of Circular No. A-76 includes R&D activities in the list of commercial and industrial activities. However, Transmittal Memorandum No. 4

accompanying the Circular deferred application of the requirements for evaluation and review for the period of one year from the effective date of the Circular. The deferral did not apply to new starts or expansions, as those terms were defined in the Circular.¹⁵⁰

The rationale for this temporary limitation on the scope of the policy was that such action would defuse the concern expressed by the agencies over the potential impact of the application of Circular No. A-76 to existing Government R&D activities. OEPP and OMB recognized that agencies might have a need for in-house R&D activities to maintain a "core capability." If such a need could be justified the activity would be excluded from the coverage of the Circular as a "governmental function." In all other situations the policy of the Circular would apply. However, it generally was felt that additional guidance was needed to ensure consistency in determining and justifying the size of a core capability.¹⁵¹

In order to provide the necessary guidance, OEPP established an interagency committee in conjunction with the Office of Science and Technology Policy and under the Federal Coordinating Council for Science, Education, and Technology. The committee was to study the issues and recommend guidelines for appropriate and uniform agency implementation.¹⁵² Their report entitled, "A Research and Development Management Approach," was submitted on October 31, 1979, and released for public comment on January 4, 1980.¹⁵³

The conclusions and recommendations of the study committee include a general statement of concurrence with the policy of OMB Circular No. A-76.¹⁵⁴ However, the committee did not believe that a single rigid set of criteria could or should be applied to determine the appropriate extent or size of all Government research and development organizations. Instead the report identified two groups

of factors which federal managers must consider in making a discretionary decision on whether to perform an activity internally or by contract.¹⁵⁵

The factors in the first group concern those categories of activities an R&D agency must perform, notwithstanding cost, in order to carry out the agency's mission. Examples listed included agency mission-oriented studies, maintenance of a level of R&D expertise for long-term needs, independent testing and evaluation, providing a "smart buyer" capability, maintenance of a corporate memory in the field, maintenance of a quick reaction capability, performance of Congressionally mandated R&D activities, and retention of Government personnel required to staff certain national R&D facilities.¹⁵⁶

The factors in the second group were those reasons, in addition to cost, for making the decision to perform R&D activities in-house. The report classified such decisions as discretionary based on one or more of the factors listed. These included a conscious management decision based on a specific capability; a judgment on the likelihood of success with that method; a balancing of the extent of the activity against the realities of budgets, personnel skills and urgency of the need; the interest of national security; the location and availability of key technical personnel, facilities, or recognized experts; and corporate economic and labor conditions affecting the availability of non-Federal sources.¹⁵⁷

In view of the determined need to base the decision on the method of providing R&D activities on the two groups of factors, the Committee concluded that the decision could seldom be made solely on the basis of a comparison of the costs under the procedures outlined in OMB Circular No. A-76. It also found that the definition of in-house core capability for R&D activities on a Government-wide basis was impractical due to the wide diversity in Government research and development activities. The alternative recommended was the preparation of an R&D management approach by each agency which has a research and development

mission. The ultimate result would be the determination of appropriate governmental functions in the R&D area on an agency-by-agency basis.¹⁵⁸

With respect to R&D activities in excess of those determined to be governmental functions, the Committee suggested that there be no procedural differences in their handling and the handling of existing activities, new starts, and expansions.¹⁵⁹ In other words, non-governmental functions in the R&D area would not receive separate treatment under the procedures in Circular No. A-76.

In a dissenting opinion filed with the Committee's report the Department of Defense took issue with the Committee's recommendation to develop a series of agency management plans. DOD's position was that the extent of R&D activities in DOD makes even a DOD-wide set of criteria inappropriate.¹⁶⁰ The Department of Defense supported the position taken by the House Armed Services Committee in House Report No. 95-1118, May 6, 1978, which would completely exclude R&D activities from application of the Circular.¹⁶¹ This approach also would exclude those R&D activities which would not be classified as governmental functions under the Committee's recommendation.

At this point the application of OMB Circular No. A-76 to R&D activities is still "up in the air." Section 802 of the Defense Authorization Act, 1980,¹⁶² exempts those DOD activities in the area of R&D performed by DOD scientists, engineers and technicians, as well as R&D activities performed for DOD by private, commercial sources. Not exempted are activities that provide operation or support of installations or equipment used for R&D, including maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships.¹⁶³ The provisions of Section 802 will survive fiscal year 80 and remain in effect unless changed by specific action of Congress.¹⁶⁴

For non-DCD research and development activities OFPP has informally extended the one-year deferment for application of the provisions of the Circular. Therefore, the evaluation and review procedures of Circular No. A-76, including the requirement for use of cost comparisons, is limited to new starts. OFPP has indicated a formal announcement of that partial exemption will be issued in the near future.¹⁶⁵

The treatment of Government-owned, contractor-operated (GOCO) activities has been analogous to that for R&D activities. Government-owned, contractor-operated activities were excluded from coverage in the earlier versions of Circular No. A-76. This was done through the definition of "Government commercial or industrial activities" which included only those activities "operated and managed by an executive agency."¹⁶⁶

The approach taken by the bulletins which preceded the Circular was slightly different. Bulletin No. 55-4 specifically excluded GOCO facilities from the evaluation and review requirements, but such facilities were subject to the requirement for inclusion in an inventory report to be submitted to the Bureau of the Budget.¹⁶⁷ Bulletin No. 57-7 completely excluded GOCO activities since it contained no requirement for an inventory of existing activities.¹⁶⁸

With the issuance of Bulletin No. 60-2 the exception for GOCO activities was deleted. It provided for an evaluation and report of all commercial-industrial activities not evaluated under the previous bulletins. This requirement included GOCO facilities.¹⁶⁹ The 1979 revision of OMB Circular No. A-76 brings the pendulum back to this point, at least in theory.

Circular No. A-76 states that its coverage applies to the need for Government ownership in any "new start" or "expansion" of a GOCO facility.¹⁷⁰ However, Transmittal Memorandum No. 4 accompanying the Circular contemplates

potential application to all GOCO activities. It indicates that a comprehensive review of all GOCO activities is necessary to determine whether they can be completely treated under the terms of the Circular. The partial application is discussed as an interim measure, similar to the treatment of R&D activities. However, there is no timetable for the contemplated review. For that reason, it would seem the interim approach will remain in effect indefinitely.¹⁷¹

Implementation

Another measure of the Circular's scope is the extent to which specific actions or functions are required to implement the policy. The actions required by the Circular essentially are the same as those contained in the early bulletins and previous versions of the Circular. These are the compilation of a complete inventory of all Government commercial and industrial activities and contracts subject to the coverage of the Circular,¹⁷² and the review of each such activity in the inventory to determine if the existing method of performance continues to be in accordance with the policy and guidelines of the Circular.¹⁷³

During the period of public comment preceding issuance of the revised Circular, implementation was one of the most criticized aspects of Circular No. A-76.¹⁷⁴ The principal shortcomings were identified as a lack of consistency, predictability and equity in the implementation programs of the respective agencies.¹⁷⁵ To partially alleviate these problems the revision required publication of an advance schedule for reviews, public access to all reviews and decisions, and procedures for independent administrative reviews and appeals of disputed decisions.¹⁷⁶

With these requirements to provide a level of visibility and discipline and to enhance the level of management attention, the Circular continues the delegation of the responsibility for implementation to the executive agencies.¹⁷⁷

The overall responsibility is assigned to a designated official at the level of an assistant secretary, with subordinate contact points for the major components. The agencies also are required to promulgate implementing directives "with the minimum necessary internal instructions."¹⁷⁸

It would appear that the implementing directives are visualized as little more than a source to identify the designated agency official and the contact points. While this interpretation would foster greater consistency in the implementation programs by eliminating divergence by the agencies, it allows little room for amplification of the procedures for inventorying and reviewing covered activities or eliminating ambiguities in the circular identified by the agencies.

Inventories

Under the Circular, the agencies are required to prepare and maintain a complete inventory of all "Government commercial or industrial activities" which they operate. In addition to general descriptive information, the inventory should include some specific information for each activity. These are: the amount of the Government's capital investment, the annual cost of operation, the date the activity was last reviewed, and the basis justifying continued performance by Government personnel. The inventory must be updated annually to reflect the results of reviews conducted under the provisions of the Circular.¹⁷⁹

For the first time with the revised Circular agencies must also inventory contracts. This requirement extends to all contracts with a dollar amount in excess of \$100,000 annually, and which cover services which the agency determines could reasonably be performed in-house. This requirement excludes contracts awarded under a "duly authorized set aside program." It includes activities that have been converted from in-house performance to contract performance.¹⁸⁰

In addition to general descriptive information, the inventory must include: the contract number, name of the contractor, contract period, period of any options, and the total contract price or estimated cost. Periodic updates are required to reflect the exercise of options or termination of inventoried contracts and award of new contracts.¹⁸¹

The requirement for inventorying contracts in excess of \$100,000 contains one ambiguity that has not been resolved. On its face, that inventory is limited to contracts "for services which the agency determines could reasonably be performed in-house."¹⁸² It would appear it does not apply to contracts to furnish "products."

The ambiguity is created by the fact that the Circular also states a general requirement that each agency will compile a complete inventory of all "commercial and industrial activities subject to the Circular."¹⁸³ That statement covers all Government commercial and industrial activities and contracts to provide a product or service. While, as a practical matter, this does not present a significant problem of any great magnitude, it is unclear why supply-type contracts are not to be inventoried.

Periodic Reviews

Due to the way the Circular is worded, the effect of this omission is carried over to the review requirement. The first step in that process was preparation of a schedule for the review of each commercial or industrial activity and contract "in the inventory." Since only service contracts are inventoried, the scheduling requirement contains the same limitation.

The purpose of the schedule of reviews is two-fold. It gives public notice of the timing of reviews and it provides for periodic evaluation of functions to determine if the existing method of performance continues to satisfy the criteria established by the Circular.¹⁸⁴

The schedule for review of in-house activities is to provide for initial review of all activities during the three-year period following issuance of the Circular.¹⁸⁵ The Circular contemplates that all excluded activities, including governmental functions, have been eliminated from the inventory and schedule prior to the review process. Excluded activities are not subject to either the inventory or review requirements.¹⁸⁶

As part of the actual mechanics of the review process the agency is to determine initially whether the activity satisfies one of the exemptions for either "no satisfactory commercial source available"¹⁸⁷ or "national defense."¹⁸⁸ If neither exemption is appropriate, a cost comparison must be conducted to determine whether continuation of in-house performance is justified on the basis of relative cost of Government and contractor performance.¹⁸⁹

For contracted activities the schedule for review must show the date that each contract will expire and the date for the review to determine if contract performance is to be continued.¹⁹⁰ That review does not necessarily require an actual cost comparison study. The agency is required to conduct a preliminary review of the contract cost. In addition, it would seem that it must make an informal comparison with a preliminary estimate of the cost of in-house performance. The purpose of this informal cost comparison is to determine whether it is "likely" that the work can be performed in-house at a cost that is less than the cost of contract performance by a differential of 10% of Government personnel costs plus 25% of the cost of ownership of equipment and facilities. When it is determined that it is likely that in-house would be sufficiently less costly, a "formal" cost comparison is to be conducted.¹⁹¹

The review requirement is a periodic, recurring one. After the initial review activities approved for continuation will be reviewed at least once every

five years. However, this requirement for subsequent reviews can be waived by the agency head when it is determined that the circumstances supporting the initial approval of in-house performance are not subject to change. The activities affected are retained on the agency's inventory for purposes of identification and copies of the justification must be made available to interested parties.¹⁹²

Summary

Perhaps the best way to summarize the application or scope of OMB Circular No. A-76 is to state that it applies to all commercial or industrial-type activities available from commercial sources within the United States, its territories and possessions, except consulting services and major systems acquisitions. It has only partial application to R&D and GOCO activities. Coverage triggers complete and accurate inventories of those activities and periodic reviews of the methods of performance to ensure conformance to the policy of reliance on the private sector in circumstances in which it is feasible and cost effective to do so.

CHAPTER FOUR

COST COMPARISON STUDIES

Overview

This chapter considers the purpose and use of cost comparisons, the historical development of the requirement, the process of estimating the costs of in-house performance, the firm bid procedure for comparing those costs with the cost of contracting-out and some special problems associated with cost comparison studies.

Requirement for Use of Cost Comparisons: Historical Perspective

Cost Comparisons as a Check on Competition

The third precept of the policy statement announced by OMB and OFPP in the revised OMB Circular No. A-76 places economy and efficiency of Government on the same level as the established policy of reliance on private commercial sources to supply the Government's needs. In the area of commercial or industrial activities, the lowest cost as determined by a cost comparison has become synonymous with economic and efficient operation of Government.¹⁹³

The rule concerning cost treatment may be simply stated. A Government agency is authorized by the revised Circular to establish in-house capacity or to continue an existing activity to provide a product or service that is obtainable from a private source when a comparative cost analysis, prepared as provided in the

Cost Comparison Handbook, indicates that the cost of in-house performance would be some degree lower than the cost of obtaining the product or service from a commercial or other non-Federal source.¹⁹⁴ The degree of cost saving, or "cost differential," required is determined by classification of the activity as either "existing" or as a "new start".¹⁹⁵

The idea of comparing the cost to the Government of buying goods and services on the commercial market against the cost of producing or providing the goods or services with Government employees is not unique to Circular No. A-76. Bulletin No. 55-4 provided that the "relative costs" of Government operation compared with purchase from private sources would be a factor in the determination whether to continue those manufacturing activities being conducted by in-house operation, at least "in those cases in which the agency head concluded that the product or service could not be purchased on a competitive basis and could not be obtained at reasonable prices from private industry."¹⁹⁶

Subsequent interpretation of this provision by OMB limited cost considerations to those situations in which "adequate competition" did not exist among private sources.¹⁹⁷ Competition in the marketplace was considered a sufficient check to assure reasonable prices. Taking the literal meaning of OMB's explanation, cost comparison studies essentially were to be used only when there was a sole source or no source. In other situations the work was to be contracted without a cost comparison and despite potentially lower costs through Government operation.¹⁹⁸

Federal employee unions complained bitterly about the lack of a comparative cost analysis in the decision-making process for contracting out;¹⁹⁹ however, subordination of cost considerations or consideration of the impact on Government employee positions apparently was a conscious policy decision. This was reflected

in the strong statement of policy in favor of commercial contracting. If the product or service was available from a private enterprise through ordinary business channels, the Bulletin required commercial contracting.²⁰⁰

From the perspective of commercial firms the provisions of the Bulletin appeared equally unpalatable. Industry complained about the implicit exception to the policy which allowed in-house operation if no competition existed among commercial firms at the time of the review. It was their view that there could be no existing competition among private businesses for work unique to, and previously conducted solely by, the federal government. They argued that cost comparisons should be required if commercial businesses were capable and willing to enter the field.²⁰¹

Industry representatives also took issue with the ambiguous standard of "relative cost". The argument on that point was that the federal government had no business conducting commercial or industrial activities at all, and that the respective costs were not comparable because the cost accounting methods used by private companies were not customarily used by Government agencies. They maintained the result would be incomplete cost data for in-house operations, making any comparison study inaccurate, biased or impossible.²⁰²

Ostensibly, Bulletin No. 57-7 was issued, in part, to further refine the concept of relative cost and its place in the Government's make-or-buy decision process.²⁰³ Like Bulletin No. 55-4, Bulletin No. 57-7 provided that the relative cost of Government operation compared to contracting would be a factor in the decision between alternatives when "the product or service cannot be purchased on a competitive basis and cannot be obtained at reasonable prices from private industry."²⁰⁴

The clarification which Bulletin No. 57-7 provided was that prices were to be considered reasonable when the price to the Government was not greater than the lowest price obtained by other purchasers, taking into consideration volume of purchases and quality of the products or services. Only in those cases when the product or service could not be purchased on a competitive basis, nor at a reasonable price on a noncompetitive basis, was a cost study appropriate.²⁰⁵

The effect of the "clarification" was to further restrict considerations of potential cost savings through Government operation. Procurement from a sole source at a greater cost was to be preferred, so long as the sole source did not discriminate against the Government by charging it a higher price than it charged its private, commercial customers.

Cost as an Exception to the Policy of Reliance on Private Sector

The first recognition of cost comparisons as a justification for continuation of Government operation of a commercial or industrial activity came about with the issuance of Bulletin No. 60-2 in 1959. That Bulletin provided the basis for in-house performance, despite adequate competition among commercial sources, upon a showing of "compelling reasons for exceptions to the general policy." Lower cost was the basis for the second "compelling reason" exception.²⁰⁶

Bulletin No. 60-2 provided that Government operation would be justified on the basis of cost only if the direct and indirect costs were analyzed on a comparable basis, and the differences were found to be substantial and disproportionately large. It did not prohibit procurement from a more costly source.²⁰⁷ To eliminate some of the ambiguities surrounding the terms "direct" and "indirect" costs which surfaced under Bulletin Nos. 55-4 and 57-7, Bulletin No. 60-2 spelled out with more detail the direct and indirect costs to be considered.²⁰⁸

Even though Bulletin No. 60-2 recognized a compelling reason on the basis of lower cost as justification for Government performance, mere demonstration of lower cost through Government operation was not a carte blanche. As a continuation of the original objective of promoting economy and efficiency in Government, it also required a comprehensive evaluation and justification of the underlying Government needs. Of particular concern were excessive operating costs, obsolescence, future replacement costs and low rates of utilization.²⁰⁹

These considerations also had an impact on utilization of cost comparison studies. Presumably, any one factor could have mitigated against in-house performance in favor of liquidation, curtailment or elimination of the Government need altogether. Only if the need was justified was consideration and justification of the compelling need for Government operation warranted based on large and disproportionately higher costs.²¹⁰

Cost Comparisons Under BOB Circular No. A-76

In actual practice, it seems cost considerations rarely were the paramount factor in the management decisions to continue, curtail or terminate Government operation of commercial or industrial activities. If it was politically or managerially expedient to contract, the decision was made regardless of cost factors.²¹¹ Under the bulletins no cost justification was required in order to supply products or services through commercial contracting procedures. The sole use of cost comparisons was to justify in-house performance of covered functions.²¹²

It was, in part, the lack of emphasis on cost considerations that led to the General Accounting Office (GAO) study of technical service contracting by the Department of Defense in 1964. The GAO concluded that substantial savings would be possible by converting the work to Government operation with Government

employees.²¹³ The repercussions of that report and the related studies by the Civil Service Commission, the Department of Defense and Congressional committees were the most significant external influences on the Executive branch leading to issuance of the first Bureau of the Budget (BOB) Circular No. A-76.²¹⁴

While BOB Bulletin No. 60-2 had based the policy of Government procurement from commercial sources on the desirability of supporting the private enterprise system, Circular No. A-76 limited that general policy to circumstances in which it would be more economical to use the private sector.²¹⁵ As enumerated at the time of issuance, the Circular's objectives were to assure that Government programs were performed with maximum efficiency, effectiveness and economy, as well as to maintain the Government's policy of relying on private enterprise.²¹⁶

To accomplish these objectives Circular No. A-76 required that a decision to rely upon Government operation of any activity for reasons involving relative costs be supported by a comparative cost analysis which disclosed, as accurately as possible, the difference between the costs which the Government would incur under each alternative.²¹⁷ It also required cost comparison studies before deciding to rely upon a commercial source if the terms of the contract would require Government financing in excess of \$50,000 for the costs of facilities and equipment to be constructed to Government specifications.²¹⁸

On the other hand, BOB Circular No. A-76 required that commercial sources be used, without cost comparison, for products or services costing less than \$50,000 per year, unless a reason existed to believe that inadequate competition or other factors were causing commercial prices to be unreasonable. However, even in those cases in which there was a finding that in-house performance would cost less than the estimated cost of commercial contracting, the Circular required "reasonable efforts to obtain satisfactory prices from existing commercial sources or to develop other commercial sources."²¹⁹

When BOB Circular No. A-76 was revised and reissued in 1967 there was no change in the general policy of reliance on private enterprise, or in the philosophy behind use of cost comparisons to justify Government operation. The revision's purpose was to clarify some provisions of the earlier version and to lessen the administrative burden of implementing the provisions of the Circular.²²⁰

The principal clarification in the area of cost studies was the inclusion of a statement that cost comparisons were to be made in any case in which there was reason to believe savings could be realized by Government performance of commercial or industrial activities. This was an extension of the provision in the original Circular for such studies when facilities and equipment costs exceeded \$50,000.²²¹

Requirement for Cost Comparisons Under
OMB Circular No. A-76 (1979)

The years following issuance of the 1967 revision of BOB Circular No. A-76 were marked by controversy. Much of this stemmed from the addition of the requirement to use standard cost factors for personnel costs. These were initiated in 1976 and suspended in 1977 with the announcement of a comprehensive study to reevaluate the policy and guidelines for relying on private enterprise.²²²

Following completion of the study and consideration of public comments on proposed provisions, the revised Circular No. A-76 was issued. The revision restructured the basic policy to incorporate the three, co-equal precepts of reliance on private sources, in-house performance of governmental functions and use of cost comparisons to identify the most economical source of supply to satisfy the Government's needs.²²³

The announced objective of the revised Circular was to create a system capable of producing consistency, predictability and equity for affected workers,

agencies and contractors. In the area of cost comparisons the objective was to be accomplished through adherence to "common ground rules" and use of a standardized procedure for cost studies.²²⁴ The procedure is outlined in the Cost Comparison Handbook issued as Supplement No. 1 to the Circular.²²⁵

There also were some changes in the Circular's requirements for use of cost studies. Beginning with the recommendations of the Commission on Government Procurement in 1972, and followed by periodic GAO reports, there had been a push to raise the dollar threshold below which commercial contracts were to be used without a cost comparison.²²⁶ The 1979 revision adopted these recommendations in principle. Activities below an estimated \$100,000 in operating costs are to be performed by contract unless in-house performance qualifies under an exception to the general policy on a basis other than lower cost. However, as under the earlier versions of the Circular, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison may be conducted.²²⁷

This exception for inadequate competition is a limited one. The Circular requires that reasonable efforts should be made before conducting the study to obtain satisfactory prices from existing commercial sources and to develop other competitive commercial sources.²²⁸ Such efforts must comport with the procurement statutes applicable to the respective agencies.²²⁹

Treatment of covered activities with estimated annual operating costs exceeding \$100,000 varies depending on the present method of performance. For existing, in-house activities, a cost study must be conducted to determine the relative cost of Government and private performance.²³⁰

Existing contracts are further subdivided. Contracts which have been awarded under the Small Business Act set-aside programs are not to be reviewed

for possible transfer to in-house performance.²³¹ Other existing contracted activities receive an informal cost comparison or review to determine "whether it is likely that the work can be performed in-house at a cost that is less than contract performance by 10% of Government personnel costs plus 25% of the cost of ownership of equipment and facilities." Only if lower cost through Government operation is determined to be "likely" is a cost comparison to be conducted.²³²

Periodic re-evaluations of both types of existing activities are required. In-house activities are reviewed according to a published schedule, at least once every five years.²³³ Contracts are scheduled for review prior to the date of expiration, including option periods.²³⁴

The remaining category of commercial and industrial activities is "new starts".²³⁵ Activities to meet a new requirement or to create new Government operations require a cost comparison analysis prior to authorization of in-house functions.²³⁶ When in-house performance is not feasible, or when contract performance would be under an authorized set-aside program, a contract can be awarded without conducting a cost study.²³⁷

Surprisingly there is no express requirement to conduct cost comparisons in those other possible cases involving new starts when in-house performance may be feasible, but the agency wishes to contract for reasons other than cost savings or on the basis of an assumption of lower costs with contract performance.²³⁸ A fairly strong argument can be made that such a requirement is implicit in the statement of policy and from the intent of the Circular's provisions read as a whole.

The third precept provides that the American people "deserve and expect the most economical performance and, therefore, rigorous comparison of contract costs versus in-house costs."²³⁹ While the intent to encourage cost studies is clear, the statement does not expressly require any action.

Perhaps the strongest argument that a cost comparison is required in all situations contemplated by the third precept is that the Circular contains specific circumstances under which a contract can be awarded without conducting a comparative cost analysis.²⁴⁰ It would seem that by negative implication a cost study would be required in all other cases.

On the other hand, the arguments against a requirement to use cost comparison in such cases have the weight of history and experience behind them. The bulletins did not require cost studies to support a decision to contract for needed goods or services.²⁴¹ The 1965 GAO and CSC studies demonstrated that such decisions were being made.²⁴² The 1966 Circular continued the same rule,²⁴³ but the 1967 revision clearly provided that cost comparison studies were to be made in all cases if there was reason to believe that savings could be realized by in-house performance.²⁴⁴ No similar provision was included in the 1979 revision.

Summary

Under the current terms of Circular No. A-76 a cost comparison is clearly required before continuation or initiation of Government performance.²⁴⁵ Similarly, it is required for conversions of activities with operating costs exceeding \$100,000.²⁴⁶ It is not required before contracting for activities with operating costs below \$100,000, when in-house performance is not feasible and for approved set-asides.²⁴⁷ It is not required if in-house performance satisfies an exception independent of cost.²⁴⁸ At best the Circular is ambiguous with respect to new requirements to be performed by contract with estimated costs exceeding \$100,000 and which are not appropriate for set-aside.

Determining Costs

Statement of Work

In those situations when a cost comparison is required by Circular No. A-76, there are major problems for the Government in estimating the costs of

in-house performance. In order for the comparative analysis to be valid the estimated costs of acquiring the needed products or services, whether from the private sector or through Government operation, must be accurate. To ensure an equitable comparison, both cost figures must be based on the same scope of work and include all significant, identifiable costs for each alternative.²⁴⁹

The Cost Comparison Handbook recognizes that the preparation of the work statement is a critical step.²⁵⁰ This is especially true for service-type activities which are labor intensive. In any case labor costs are very important to the analysis. The Government and potential contractors prepare estimates of their labor and other costs based on the level of effort and performance standards contained in the Statement of Work (SOW).

The "common ground rules" for cost comparisons outlined in Circular A-76 and the Handbook require the preparation of a "sufficiently precise work statement with performance standards that can be monitored for either mode of performance." It must be comprehensive enough to ensure that performance in-house or by contract will satisfy the Government requirement. The Handbook provides that it should clearly state "what" is to be done without prescribing "how" it is to be done. Maximum flexibility should be permitted in staffing to permit each potential performer, whether Government or contractor, to propose the most efficient approach consistent with its organization and resources.²⁵¹

The Statement of Work is also critical in another respect. The Cost Comparison Handbook specifies that the work statement should describe all duties, tasks, responsibilities, frequency of performance of repetitive functions, and requirements for furnishing facilities and materials.²⁵² In most instances the task of writing the descriptive statement is assigned to the user activity, in conjunction with a Contracting Officer. The tendency may be to be too general, thereby

jeopardizing the solicitation. The other possibility is that the SOW will be too specific, resulting in a post-award protest that the contract creates an "illegal" personal service contract.²⁵³

The Circular expressly prohibits use of its provisions as authority to enter into contracts which establish a situation tantamount to an employer-employee relationship between the Government and individual contract personnel.²⁵⁴ However, in extreme cases, specifying the place, manner, frequency and timing of performance and establishing and monitoring performance standards to judge that performance could give rise to an objection that the contractor's employees would be controlled and managed by the Government.²⁵⁵

Estimating Labor Costs

The firm bid procedure adopted by the revised Circular essentially places the Government in the position of another bidder or offeror. The Government agency prepares a cost estimate on the same level of effort and performance standards provided to commercial firms in the Statement of Work.²⁵⁶ On this basis, and not the existing manpower authorization, the Government estimates the number and skills of its employees that would be required to perform the work.²⁵⁷

In order to assure adequate comparability, the Cost Comparison Handbook requires that the agency involved should assure that Government operations are organized and staffed for the most efficient performance. It provides that to the extent practicable and in accordance with agency manpower and personnel regulations, agencies should precede reviews under the Circular with internal management reviews and reorganizations for accomplishing the work more efficiently.²⁵⁸

While it would seem to be contrary to the best interest of the affected employees, the federal employee unions have expressed a willingness to cooperate

with such management reviews and reorganizations.²⁵⁹ They are pragmatic enough to see that the long range effect of opposing potential reductions of personnel slots and relocations would mean the loss of Government operation of more commercial or industrial activities, with a resulting total reduction in force, relocation or cross-over to civilian employment with the successful contractor. Almost any one of these spells a greater loss of union membership and union strength and a greater adverse impact on the members themselves.

The importance of the manpower assessment is exacerbated in those commercial or industrial-type activities which are principally concerned with providing services. Since service activities are labor intensive, estimation of labor costs essentially determines the accuracy and the outcome of the subsequent cost comparison.²⁶⁰

One factor in the determination of how many employees will be needed is worker productivity. This is also an area of debate on the comparability of labor costs between Government operation versus contract performance.²⁶¹ Circular No. A-76 skirts the delicate issue entirely. It states, as a matter of policy, that past use of military personnel, civilian personnel and contract performance have all been "responsive and dependable in performing sensitive and important work."²⁶²

Despite that gratuitous statement of fact, worker productivity plays a key role in estimating labor costs. This is true for a potential contractor's purposes, as well as for the Government's estimate. In this more pragmatic sense there is no assurance that the respective parties will use identical productivity factors for estimating the size of the work force.²⁶³ Past experience and estimating techniques control the bidder or offeror's result. Chapter III, Part C of the *Cost Comparison Handbook* details Government procedures.²⁶⁴

The Handbook's coverage of personnel costs is divided into two topics: direct labor and fringe benefits. Direct labor costs are to be determined by estimating the time required to perform the work and the skill levels needed for employees performing the work.²⁶⁵

For existing activities the Handbook keys the time element to the number of nonsupervisory positions authorized for the operation. For new starts it suggests use of prior experience for similar activities, if available, and engineering standards or engineering estimates in other cases.²⁶⁶

The skill requirements are stated in terms of a Wage Board (WB) or General Schedule (GS) level. These determine the hourly rate to be multiplied by the estimated time requirements, stated in terms of man-hours. For existing Government operations the Handbook uses the actual rates for current employees. For positions that are not occupied, and for all new starts, it uses salary step 5 for the required GS levels and wage step 3 for Wage Board position levels.²⁶⁷

Additional factors are to be added, if applicable, to the estimate of direct labor costs. These include night or environmental differential pay and premium pay for Wage Board positions and a factor of 18% to compensate for the amount of annual leave earned and sick leave, holiday and other leave taken.²⁶⁸

Standard Cost Factors

For purposes of estimating the direct labor cost of Government operation, fringe benefits also are included. In this regard the Circular establishes standard cost factors.²⁶⁹ These costs are stated as a percentage of projected payroll costs and ~~add an~~ additional factor of 26% to the personnel costs of in-house performance. Individually these percentages are as follows: retirement benefits for employees under Civil Service Retirement -- 20.4%; health and life insurance -- 3.7%; and other benefits such as workmen's compensation, unemployment and bonuses or awards -- 1.9%.²⁷⁰

These cost factors in general, and the retirement factor in particular, have engendered the most criticism of Circular No. A-76.²⁷¹ They were added to the Circular by Transmittal Memorandum No. 2 in 1976. Prior to that time, Circular No. A-76 provided as follows:

Include cost of all elements of compensation and allowances for both military and civilian personnel, including costs of retirement for uniformed personnel, contributions to civilian retirement funds, (or for Social Security taxes where applicable), employees' insurance, health, and medical plans, (including services available from Government military or civilian medical facilities), living allowances, uniforms, leave, termination and separation allowances, travel and moving expenses,²⁷² and claims paid through the Bureau of Employee's Compensation.

The 1967 revision of Circular No. A-76 contained the same language except in the area of retirement costs. In that regard it required inclusion of "the full cost to the Government of retirement systems, calculated on a normal cost basis"²⁷³ Since the Government contribution to the Civil Service Retirement program is 7% of the employee's current rate of base pay, that was the factor used in cost comparisons.²⁷⁴

When Transmittal Memorandum No. 2 added the standard cost factors, the retirement factor increased from the 7%, corresponding to the "static normal cost" of Government contributions to employees' retirement, to 24.7% of payroll costs. The figure of 24.7% was based on "dynamic normal cost projections" which recognize probable future salary and benefit increases.²⁷⁵ The stated purpose of initiating standard cost factors was to make the agencies' task of preparing cost studies more "convenient". The intent behind the increase in the cost factor was to bring the cost studies more in line with reality.²⁷⁶

Notwithstanding the purpose or intent of OMB's action with regard to the retirement cost factor, it was the subject of intense criticism.²⁷⁷ Following the

change of presidential administrations the entire implementation program of Circular No. A-76 was identified for a comprehensive review. Pending the outcome of that review, Transmittal Memorandum No. 3 reduced the retirement cost factor to 14.1% of payroll costs. The 14.1% figure was based on a static or non-accrual method of computation. It represented actual payments to employee annuitants, reduced by employee contributions for the same period.²⁷⁸

The revised Circular reinstituted the dynamic normal cost projection basis of computation for the retirement cost factor. Using cost projections for the Civil Service retirement system actuarial model OMB and OFPP arrived at a figure of 20.4% of actual payroll costs. This was the figure included in the current Circular.²⁷⁹

As explained during Congressional hearings prior to issuance of OMB Circular No. A-76, the dynamic normal cost is the cost over a period of time, that is, on an accrual basis. In addition, it considers real wage growth, interest rates and inflation. The Circular's figure of 20.4% is based on economic assumptions supplied by the Council of Economic Advisors. These were: real wage growth - 1 1/2%; real interest rate - 2 1/2%; and inflation base - 4%.²⁸⁰

The cost factor resulting from plugging the economic assumptions into the Civil Service actuarial model is quite sensitive to certain changes in the assumptions. The greatest impact being associated with real interest rates.²⁸¹ For this reason, the accuracy of the assumptions determines the accuracy and fairness of the cost factor.

The criticism of the retirement cost factor has been centered on its validity in light of actual experience. Also, there have been complaints that it creates an unfair bias since social security costs of contractor employees do not receive similar treatment.²⁸² The arguments made by the critics of the present system have at least partial merit.

The actuarial model and the economic assumptions used to calculate the retirement cost factor were evaluated by the General Accounting Office in 1976. In the resulting reports GAO concluded that the 24.7% cost factor instituted by Transmittal Memorandum No.2 and the economic assumptions forming its basis had been reasonable. However, GAO also recalculated the cost factor based on their own economic assumptions and arrived at a figure of approximately 30%. In other words, the report concluded that 24.7% was more reasonable than the 7% figure previously used, but a higher figure would more closely reflect actual cost experience for the federal government.²⁸³

GAO also considered the effect of an increased cost factor for retirement on the outcome of cost studies. It was their conclusion that cost studies were not as likely to be affected by the retirement cost factor as by other influences. In particular, GAO found that estimating the size of the work force was the matter most directly controlling the outcome.²⁸⁴

The conclusion reached by GAO begs the fundamental question whether the standardized cost factors "tip the scales" unfairly to favor contracting. The complaint in this area has been that Circular No. A-76 does not include a cost factor for the potential liability of the federal government for unfunded social security costs. The argument is that this potential liability is a retirement cost to be funded by the Government in the event of contract performance.²⁸⁵

This argument advanced by federal employee unions ignores the fact that it is not a present cost, or even a future cost, under existing Social Security laws. Testimony during Congressional hearings indicated that such costs would be appropriate considerations in the event the Congress takes action to fund the Social Security deficit. A similar deficit, or unfunded liability, exists for Civil Service retirement funds. This amount is not taken into account in calculating the

retirement cost factor in the Circular. Therefore, Social Security deficits are not appropriate factors for cost studies under existing law.²⁸⁶

Full vs. Incremental Costs

Aside from the direct costs associated with employee compensation the Circular announced a move toward full costing "to the maximum extent practical."²⁸⁷ Earlier version of the Circular used incremental costs as the basis for estimating the expense of in-house performance of commercial or industrial activities. The incremental method of computation was designed to estimate the amount by which all in-house costs (direct and indirect) would increase or decrease from existing levels of activity.²⁸⁸ The justification for use of such a calculation was that it provided the most realistic measure available of the financial consequences of deciding to provide or not provide the product or service in-house.²⁸⁹ However, incremental costing does not take into account costs such as Government G&A which essentially do not change regardless of whether the activity is done in-house or by contract. Under a fully allocated costing method those costs would be allocated among all the activities of an agency.²⁹⁰

The term "full cost" used in the revised Circular is not readily defined. However, the Circular provides: "All significant Government costs (including allocation of overhead and indirect costs) must be considered . . ."²⁹¹ Referring to this requirement in its comments on the proposed changes to A-76, GAO noted: "It is difficult to determine the extent to which fuller costing will be carried, but it apparently is intended to change the method of costing in-house activities from an incremental to a fully allocated basis."²⁹² This interpretation would seem to agree with the intent of the Circular.

Comparing Costs

Firm Bid Procedure

One of the most substantial innovations of the March, 1979, revision of OMB Circular No. A-76 was the inclusion of the Cost Comparison Handbook. The Handbook was to be the first of a series of supplements to the revised Circular.²⁹³ Its purpose is to provide detailed instructions for developing a "comprehensive and valid comparison of the estimated cost to the Government of acquiring a product or service by contract and of providing it with in-house, Government resources."²⁹⁴ Its objective is to establish consistency, assure that all substantive factors are considered in cost comparisons, and achieve uniformity among agencies in comparative cost analyses.²⁹⁵

Prior to the issuance of the revised Circular and the Cost Comparison Handbook, the mechanics of conducting cost comparisons was a matter to be covered by each agency's implementing directives. The result was a lack of uniformity. Some agencies never issued implementing directives. Others provided for cost comparisons but used various methods to obtain cost estimates for commercial contracting.²⁹⁶

The most prevalent technique for estimating the cost to the Government of contract performance was the use of informational quotes of contractor costs. This practice was criticized by the GAO in a 1977 report on the basis of its potential to discourage submission of cost data, the unreliability of data submitted, and the possibility that prices would not be treated as firm by the potential contractors.²⁹⁷

Most of the problems found to exist in the use of informational quotes were eliminated in the firm bid procedure used by the Department of the Air Force.²⁹⁸ This technique was adopted by the revised Circular for Government-wide use. It

utilizes a formal advertising or negotiation procedure which compares contractors' competitive firm bids and offers with the documented estimate of in-house costs.²⁹⁹ The GAO's 1977 report noted that this procedure is far superior to other procedures used to develop contractor costs.³⁰⁰

The Cost Comparison Handbook requires that the firm bids or proposals be solicited in accordance with the pertinent acquisition regulations. Bidders or offerors must be advised that an in-house cost estimate is being developed and that a contract may or may not be awarded, depending on the comparative cost of the alternatives.³⁰¹

Most criticism of the firm-bid method of obtaining contract costs for comparisons has involved the conflicts between it and the procurement or acquisition regulations. Government solicitation of bids or proposals without an intent to award a contract is generally not justified. While the firm-bid solicitation may or may not result in award of the proposed contract, the Comptroller General has agreed with the Government that there is a definite intent to award a contract if a responsive bid or offer is made by a responsible business and the total cost of contracting is less than the total cost of in-house performance. Prospective contractors are informed of these conditions in the solicitation.³⁰²

Another conflict noted involved the unavailability of the Government in-house estimate to the Contracting Officer prior to bid opening or conclusion of negotiations.³⁰³ This practice allegedly interferes with his ability to obtain an independent Government estimate and to ensure that funds are available for the procurement before the solicitation is issued.³⁰⁴ Recent changes in the Defense Acquisition Regulation (DAR) have eliminated these problems.³⁰⁵

Comparability of Costs

The theory upon which the firm bid procedure rests is that the respective costs of in-house and contract performance may be equitably compared. This condition of comparability hinges on the establishment of a common standard of performance in the Statement of Work.³⁰⁶ The equity of the system turns on analysis of external constraints affecting the cost elements of each estimate.

At the times of issuance of Bulletin No. 55-4 and Bulletin No. 57-7 part of the justification for the policy of complete reliance on private enterprise and complete withdrawal of the Government from commercial and industrial activities was the judgment that the respective costs of operation were not comparable.³⁰⁷ With the development of the exception for disproportionately higher costs in Bulletin No. 60-2 there was a recognition that the cost figures could be made comparable.³⁰⁸ To some extent the addition of cost differentials and standard cost factors in Circular No. A-76 reflected attempts to compensate for the lack of accurate cost data by artificial, if not arbitrary means. This partially eliminated the need to make time-consuming and complex calculations for the costs of personnel, plant and equipment.³⁰⁹

There remains one troublesome problem on the issue of the equitable comparison of personnel costs. Wage rates for Federal blue collar employees are determined under the provisions of the Federal Wage System.³¹⁰ Wage rates for contractor employees under a Government contract are subject to minimum wage determination under applicable federal labor standards, primarily the Service Contract Act of 1965.³¹¹ Since personnel costs are generally the determinative element in cost comparisons, the external forces affecting these wages can control the outcome of the make-or-buy decision. This is especially true in labor intensive service activities.

The argument is that the wage systems created by federal law make the personnel costs uncomparable. Neither the workers most affected nor their employers have control over that decisive factor in the cost comparison. Partially for this reason a Study Group of the Commission on Government Procurement noted an urgent need to eliminate the requirement for actual cost comparisons in most cases. They would recommend a retreat to more absolute reliance on private competitive sources or use of some other factor besides cost upon which to base the make-or-buy decision.³¹²

There are certain inherent economic advantages if personnel considerations are minimized. Periodic reviews or re-evaluations with cost comparisons would act as a check on significant escalation of personnel costs. Whenever the personnel costs of either method surpassed the actual prevailing wage in the area, a cost comparison would reflect more economic performance by the other method of performance.³¹³

Buying In

Periodic re-evaluation is also one of the keystones of the check on the contractor "buy-in". Such practices also affect the comparability of the costs of performance since a successful bidder would be submitting a bid below actual cost in order to obtain some future advantage.³¹⁴

Circular No. A-76 attempts to lessen the possibility of buy-ins by strongly suggesting use of prepriced options or renewal options for the out-years. The use of options has some advantages over recompetition. They allow continuity of operation, the possibility of lower contract prices for contracts requiring contractor investment in equipment or facilities, and reduced turbulence and disruption.³¹⁵ An additional advantage is the reduction of cost through avoidance of a formal solicitation of bids and preparation of an in-house estimate, where that would be appropriate.

Options or recompetition lessen the likelihood of a buy-in substantially, but they cannot eliminate the possibility. In a recent case considered as a bid protest by the Comptroller General of the United States the protester, RCA Service Company, admitted it was attempting to buy-in for its own reasons. The Army had issued a Request for Proposals (RFP) to determine whether to contract for base operations support services at Fort Gordon. As part of its "best and final" offer RCA submitted a cost ceiling proposal which reduced its offered price for the base period to an amount less than its estimated cost of performance.³¹⁶

The reason for the protest after award had nothing to do with the make-or-buy decision; however, the protester was arguing that its proposal was wrongly rejected without consideration. Its rationale was that the admitted loss situation would provide a greater incentive to perform effectively because it would want to secure future contracts to recoup its initial "investment".³¹⁷

The Circular provides additional incentive for buying-in on functions currently being performed by Government employees. It includes an admitted bias for maintaining the status quo.³¹⁸ For existing Government commercial or industrial activities Circular No. A-76 requires a cost-savings differential of at least 10% of the estimated Government personnel costs for the period of the comparative analysis. However, once that barrier is broken the bias shifts to favor continuation of contracted operations. Reversion to in-house performance requires a savings factor of 10% of Government personnel costs, plus 25% of the cost of ownership of equipment and facilities.³¹⁹ While the 25% may not be significant for many service activities, the standard cost factors totalling 26% essentially take its place for labor intensive operations.³²⁰

CHAPTER FIVE

REVIEWS AND APPEALS

This Circular provides administrative direction to heads of agencies and does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular, except as specifically set forth in Section II below.³²¹

Independent Agency Reviews - The "Audit" Function

One objective of the implementation program under the revised OMB Circular No. A-76 was to bring the entire Government make-or-buy decision-making process "into the sunshine." The purpose of this public awareness was to foster consistency, predictability and equity for affected workers, agencies and contractors. All pertinent information is to be made available for public scrutiny by a simple written request. This includes information on which activities are to be reviewed and the schedule for review.³²²

The availability of information to interested parties is only one part of the Circular's equation to assure fairness and conformity to the established policy and procedures. While implementation is the responsibility of the respective executive agencies, the Circular has reduced the amount of agency discretion by providing detailed guidelines and procedures. However, compliance enforcement is still an internal administrative function of the agencies.

Enforcement actions under the Circular involve two levels. One of these is automatic, and the second is triggered by a formal request for review. The

automatic review procedure is part of the cost comparison process under the Cost Comparison Handbook. The Handbook requires that the completed Cost Comparison Form be submitted to a "qualified activity independent of the cost analysis preparation" to ensure that the Government's estimated costs have been prepared in accordance with the provisions of the Handbook and the Circular.³²³

This requirement for an independent intra-agency review is loosely referred to as an audit.³²⁴ However, informal guidance provided by OFPP indicated that an actual accounting audit was not contemplated or required.³²⁵ Apparently the intended purpose of this review is to assure that the in-house estimate was prepared in the manner specified by the Handbook, and not to verify the accuracy of the dollar figures entered on the form.³²⁶

The Handbook provides that "minor discrepancies" may be disregarded in the review. On the other hand, "significant discrepancies" are to be reported to the party responsible for preparing the cost comparison. The independent reviewer indicates what impact the discrepancy has on the cost study or recommends that the preparer correct the discrepancy and resubmit its estimate.³²⁷

The leverage for enforcement is rejection of an uncorrected in-house estimate. If the solicitation pertains to a "new start" and the estimate cannot be corrected in a timely manner, the in-house figure is to be rejected and the contract awarded. Conversely, if the solicitation applies to an activity being performed in-house, and the estimate cannot be corrected within the time specified for acceptance, the solicitation may be cancelled and the comparison rescheduled for a later date.³²⁸

Two points are noteworthy with regard to this process. First, the agency's preparer of the in-house estimate has no incentive to intentionally fail to follow the estimating procedures outlined in the Handbook. The Government is the only

one who stands to lose under the rejection guidelines.³²⁹ In addition, for solicitations involving current in-house activities, resolicitation essentially is a second chance for commercial businesses only. The "eat is out of the bag" for the in-house estimate. Private bidders have all the information necessary to undercut the Government "bid" and force conversion to contract performance.

The second point alleviates some of the potential sting of this enforcement process. The Handbook's reference to cancellation and resolicitation is not directive. It is within the agency's discretion to cancel the solicitation and perform the work in-house.³³⁰ Certainly, such a decision should be reserved for situations in which resolicitation would not be in the best interests of the Government, weighing the seriousness of the discrepancy in the in-house estimate against the potential unfairness of recompetition.³³¹

Agency Appeals Procedure

The comprehensive review leading to revision of OMB Circular A-76 included as one of its objectives the creation of a system to assure fairness to all parties without creating a quagmire of restraints and delays for the agencies.³³² One of the proposed provisions was a procedure for appeal of agency decisions under the Circular. A number of possibilities were considered including review by OMB or OFPP. That was opposed by the agencies, as was extension of the Comptroller General's bid protest procedure to contracting-out decisions.³³³ The final result was creation of a right to an independent, objective, administrative review within the affected agency. The Circular establishes the basic right of appeal, but specific procedures are to be established by the agencies' implementing directives.³³⁴

Under the Circular, these agency-level appeals may be initiated by any party "directly affected" by any "determination made under this Circular."³³⁵

While these are denominated as appeals it essentially is another informal, administrative review; however, its scope exceeds that of the audit review conducted following bid opening. The determinations subject to review are not specified. It may be inferred that it includes both the initial determination whether to contract or perform work in-house and those preliminary determinations which are part of the decision-making process.³³⁶

The critical question in this area is how far back in the decision-making process does the right to appeal extend. Arguably, once an activity has been inventoried as a commercial or industrial activity to which the Circular applies, all determinations made in accordance with the Circular or the agencies implementing directives are subject to review.³³⁷ This would include the determination whether an activity satisfied the policy exceptions for either no satisfactory commercial source available or for national defense. It is clearly applicable to whether the exception for higher cost is satisfied on the basis of a completed cost comparison.³³⁸

In addition to justifying the existence of a non-cost exception allowing in-house performance, the agency makes determinations whether an activity should be contracted without a cost comparison. These include whether the estimated annual operating costs are less than \$100,000 and, if so, whether inadequate competition or other factors might cause commercial prices to be unreasonable.³³⁹ It includes the determination whether it is likely that work can be performed in-house at a cost that is less than contract performance by the requisite cost differential.³⁴⁰ It also includes a determination that in-house performance is not feasible.³⁴¹ It would seem these are all determinations made "under the Circular" and subject to appeal.

The right of appeal is clearly applicable to the ultimate decision whether to contract or to perform a function in-house which reflects the outcome of a cost comparison study. The Circular also provides that review extends to the "rationale" upon which the decision was based.³⁴² The rationale for saying that one method of performance is more economical than the other is the outcome of the cost comparison. However, that outcome results from following the series of steps outlined in the Cost Comparison Handbook. For that reason, an affected party can seek agency review of compliance with the guidelines for the cost comparison process, from preparation of an adequate SOW and in-house estimate to proper application of the standard cost factors.³⁴³

The Circular does place limits on the right of appeal. It states that the procedure may be used only to resolve questions of the determination between contract and in-house performance. In other words, it does not apply to questions concerning award of a contract to one bidder or offeror in preference to another private business which submitted a bid or proposal.³⁴⁴

A "directly affected party" may initiate an appeal by filing a written request raising a specific objection or objections concerning an appropriate matter.³⁴⁵ Affected parties include federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives.³⁴⁶ The Circular requires an "expeditious determination, within 30 days." The determination must be made by an official at the same or higher level than the official who approved the original decision. That may be the immediate superior of the approving authority; however, to assure an independent review it may be the immediate superior of the highest level official actually participating in the decision-making process. The decision on the appeal is final within the agency.³⁴⁷

GAO Bid Protest Procedure

The General Accounting Office (GAO) bid protest procedure is a third, and extra-agency mechanism to obtain review of an executive agency's determination whether to perform work in-house or by contract. Classically, GAO bid protests involve disputes over the proper bidder or offeror to receive award of an agency contract.³⁴⁸ However, the possibility exists that a protest under this procedure could involve disputes concerning the Government's make-or-buy decision, since the Circular places the agency activity in the role of a "bidder" under the firm bid solicitation procedure.³⁴⁹

There are many similarities between the bid protest procedures and the intra-agency appeals process. Both are initiated by written requests for review, made by "interested" or "affected" parties, and both require immediate filing of requests in order to be considered timely.³⁵⁰ Also, the potential remedies available are essentially the same for the appeals procedure and bid protests before award.³⁵¹

Perhaps the greatest differences are those involving the substantive scope of the review, and the effect of filing on impending agency action. There also is some difference in the definitions of "interested parties," under GAO procedures, and "affected parties" under agency appeals.

Under the detailed bid protest procedures promulgated by GAO an "interested party" is an actual or eligible bidder, a prospective subcontractor or supplier, an industry association or a labor union, certain federal agencies, a defaulted contractor, an ineligible bidder protesting the eligibility of an actual bidder, and a Congressman or Senator.³⁵² It does not include a party whose only interest is as an expert on procurement, a concerned citizen or a prospective employee of a bidder.³⁵³

the exclusion of prospective employees which sets off the bid protest by appeals procedure. The Circular emphasizes that the appeals intended to protect the rights of "all affected parties." These include all contract employees and their representatives, but also federal and their representative organizations.³⁵⁴

There is also a distinction made between the matters considered by the broad range of determinations subject to the appeals process.³⁵⁵ Bid protest function within the settlement authority of GAO over the accounts of the agency. For this reason, it will consider only those protests propriety of award of a contract under laws or regulations having the force of law.³⁵⁶ In the area of agency determinations under OMB Circular 66, GAO's bid protest procedures would apply only to those matters involving cost comparison studies used as part of the firm bid solicitation process provided by the Circular.³⁵⁷

When the General Accounting Office receives a bid protest there are certain conditions placed on the agency's award of the affected contract. While the Comptroller General may proceed with award while a protest is pending before the Comptroller General, procurement regulations require that he (a) document the protest with a justification for award; (b) obtain approval for award by an official at a higher level; and (c) give the Comptroller General notice of the protest before making award.³⁵⁸ Under the Circular's appeals procedure the agency is required to act expeditiously on the appeal; however, every effort is to be made to complete the award of the contract.³⁵⁹

Over the years the decisions of the Comptroller General have held that Circular A-76 and its predecessors were expressions of Executive branch policy and which did not establish legal rights and responsibilities and which were not

within the decision functions of the General Accounting Office.³⁶⁰ They held that it was not a regulation in the sense that failure of an agency to comply may affect the validity of the procurement.³⁶¹ In addition, the decisions held that even upon the basis of an admittedly erroneous cost analysis, the GAO could provide no remedy.³⁶²

In 1979 the GAO changed its position with respect to agency make-or-buy decisions. The Comptroller General's decision in the matter of Crown Laundry and Dry Cleaners, Inc. (Crown Laundry) indicated a willingness to consider bid protests concerning the propriety of certain decisions made under Circular No. A-76.³⁶³ Even though the agency was following the guidelines established by the earlier versions of the Circular, that decision is a landmark for current treatment of these matters.

The Air Force had solicited firm bids from potential contractors to perform laundry and dry cleaning services at Keesler Air Force Base, Mississippi. The Invitation for Bids (IFB) advised that bids would be subject to a cost comparison with the Air Force in-house estimate, and that the solicitation would be cancelled if the lowest bid was more than the Government estimate. Crown Laundry submitted the only bid, which exceeded the amount of the in-house cost figure, and the Air Force cancelled the solicitation. Crown Laundry protested to GAO that the cost comparison had been improperly conducted because of errors in fringe benefits rates provided in the solicitation. There was no dispute among the parties that the stated rates were erroneously high.³⁶⁴

In the decision in Crown Laundry, the Comptroller General distinguished its earlier decisions. It noted that generally the Comptroller General regards a dispute over an agency decision to perform work in-house rather than by contract as involving a policy matter to be resolved within the Executive branch, citing

General Telephone Company of California, B-189130, July 6, 1978, 78-2 CPD 9. However, it went on to hold that an agency's utilization of the procurement system to aid in its decision-making is detrimental to the system if, after the agency induces the submission of bids, there is a faulty or misleading cost comparison which materially affects the decision as to whether a contract will be awarded.³⁶⁵

The effect of this statement was not immediately clear. The opinion in Crown Laundry did not consider the merits of the bid protest. The case was dismissed without decision on the basis of timeliness. The protester had received a copy of the Government's in-house cost estimate over two months before the protest was filed. Surprisingly, despite the potential impact of the dictum on consideration of protests involving faulty cost studies and the admission of error by the agency, the protest was not determined to be appropriate for review under the significant issue exception to the timeliness rules.³⁶⁶

The next bid protest dealing with the subject of OMB Circular No. A-76 was St. Joseph Telephone & Telegraph Company (St. Joseph).³⁶⁷ That opinion was issued just two weeks after Crown Laundry, but, unlike Crown Laundry, St. Joseph involved interpretation of the 1979 revised Circular.

The St. Joseph protest resulted from a solicitation for the purchase of a telephone system. The protester was excluded from bidding since its business was leasing and maintaining such equipment. In this case the Corps of Engineers intended to perform the operation and maintenance functions with in-house personnel without a cost comparison study.³⁶⁸

The basis of the protest was that the solicitation was unduly restrictive of competition and that it violated the policy established by OMB Circular No. A-76. With respect to the alleged violation of the policy of the Circular, the Corps argued that the activity came within the exclusion for "governmental functions."³⁶⁹

The opinion of the Comptroller General refused to deal with the arguments made by the protester concerning Circular No. A-76. It reiterated the earlier position that determinations made under the Circular, such as to operate and maintain equipment with Government personnel, "are matters of Executive policy which are outside the scope of the bid protest decision-making process."³⁷⁰

The distinction between the position taken in Crown Laundry and that taken in St. Joseph turns on the use of the procurement process in Crown Laundry. In Crown Laundry the Air Force solicited bids with award contingent on the outcome of the cost comparison study. The rationale for the GAO position was that the Government implicitly promised to fairly consider the bids, with respect to other bids and with respect to the Government's in-house cost estimate.³⁷¹ Use of a "faulty or misleading cost comparison" as the basis for cancellation of the solicitation in favor of Government operation was viewed as "detrimental to the (procurement) system."³⁷²

In St. Joseph there was no cost comparison. The Corps of Engineers solicited bids for a typical supply contract. There was no apparent consideration of in-house production; however, it might be assumed Government production would not have been feasible. Likewise, there was no solicitation of bids for the necessary operation and maintenance of the purchased equipment. The agency stated that it would rely on the exclusion of governmental functions as the basis for in-house performance without a cost comparison. In essence, that was the determination which St. Joseph was protesting, and the GAO flatly refused to consider such matters when not connected with the procurement process.³⁷³

Another bid protest decision issued in November, 1979, considered the questions of what procedures were required for cost comparisons made by agencies within the Department of Defense, and the burden of proof for demonstrating

compliance or noncompliance with those procedures. The protest was filed by Amex Systems, Inc. (Amex).³⁷⁴ Like the earlier protests it involved a decision by the Government agency to perform a commercial or industrial activity with Government personnel. The firm-bid solicitation advised that the decision to award a contract would be determined by the results of a cost comparison study to be made.³⁷⁵

The study was conducted according to guidelines established by the 1967 version of the Circular and in effect prior to June 30, 1976, as required by section 814 of the Department of Defense Appropriation Authorization Act, 1973 (Act).³⁷⁶ The Act required that any cost comparison conducted prior to September 30, 1979, be made in accordance with the 1976 procedures. In this case, the cost study was conducted prior to September 30, 1979, but the contract was to commence on October 1, 1979, after the end of the fixed year covered by the Act.

The protester argued that the procedures of the Circular's Cost Comparison Handbook should apply. The argument made by Amex was that it was prejudiced because the use of the pre-1976 procedures resulted in the comparison of essentially dissimilar services. Without actually stating whether the Air Force was correct in applying the procedures called for by the Act, the protest was denied on the basis of the protester's inability to present information and evidence to substantiate its claim that the cost comparison was erroneous.³⁷⁷

The decision clearly demonstrated that the protester has the burden to demonstrate that the cost comparison was "either faulty or misleading" and that the agency's actions were "detrimental to the integrity of the procurement system." While it was not clearly stated, the decision apparently applied the "reasonable basis" standard of review in upholding the propriety of the agency's actions.³⁷⁸

The exact extent to which GAO would go to review contracting-out decisions was not disclosed until February, 1980. Two separate locals of the American Federation of Government Employees (AFGE) protested an Air Force decision to contract for certain laboratory functions at McClellan and Robins Air Force Bases.³⁷⁹ The threshold question addressed by the Comptroller General's decision was whether the protest by these union locals was within the scope of the exception drawn by Crown Laundry.

In dismissing the protest without considering its merits the Comptroller General was formulating both a rule of "standing" and of "justiciability."³⁸⁰ The decision indicates that the exception to the longstanding refusal to consider protests concerning the propriety of an agency's make-or-buy decision was a narrow one. It was intended to protect parties that had submitted bids from the arbitrary rejection of their bids. For that reason, the exception providing for review does not extend to nonbidders.³⁸¹ Since the unions were not bidders, the exception recognized in Crown Laundry did not apply.

The effect of the AFGE opinion is to foreclose the GAO bid protest route to all "affected parties" under the appeals process except "contractors and potential contractors". However, it does not stand for the proposition that unions necessarily are not "interested parties" under the bid protest procedures of the GAO. It simply means that the GAO will not consider bid protests concerning the propriety of an agency's decision to either perform work in-house with Government personnel or contract for performance of the work, except those protests filed by an actual bidder alleging that the agency had conducted a cost comparison which did not conform to the terms of the solicitation inducing the submission of bids. Such reviews are deemed necessary to preserve the integrity of the procurement system.³⁸²

Judicial Review

The final avenue for review of administrative determinations which are part of an agency's make-or-buy decision is court action. Prior to 1970 the federal courts held that unsuccessful bidders had no standing to protest a Government contract award in court.³⁸³ The 1970 decision by the Court of Appeals for the District of Columbia in Seanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970) held that an unsuccessful bidder could have the propriety of the rejection of his bid considered by the courts.³⁸⁴ Under the Seanwell doctrine District Courts have granted temporary and permanent injunctions against award of contracts,³⁸⁵ held that determinations made as part of an award were erroneous as a matter of law,³⁸⁶ and directed award to a firm other than the one proposed by the contracting agency.³⁸⁷

Relationship Between GAO and the Courts

The overlapping of the administrative process for relief from GAO and the judicial remedies under Seanwell have created some problems and uncertainty for complaining parties. As between GAO and the courts, GAO will not consider a protest where the same issues are before a court of competent jurisdiction, unless the court has issued a temporary restraining order or preliminary injunction to stay procurement action pending decision by the Comptroller General, or the court otherwise indicates its interest in obtaining the Comptroller General's views on the protested matter.³⁸⁸

On the other hand, if the Comptroller General has already decided the case and the contracting agency action is consistent with that decision, federal courts are likely to refuse to issue injunctive relief unless the protester can demonstrate that the Comptroller General's decision was arbitrary or capricious.³⁸⁹ Overall, the federal courts have demonstrated a great reluctance to grant any permanent

relief unless the procurement is shown to be without rational basis, or in violation of statutory boundaries.³⁹⁰ It has been said that the protester must show a "flagrant disregard for the regularity of contracting procedures"³⁹¹ instead of "sloppy if not irregular" procurement practices.³⁹²

Justiciability

In the area of procurement decisions under the policy and guidelines of OMB Circular No. A-76 and its predecessors, there is little history of judicial involvement under the Administrative Procedure Act (APA)³⁹³ as applied in the *Seanwell* decision. The APA provides judicial review to any person adversely affected by Government agency action. One exception to this provision prohibits review if "agency action is committed to agency discretion by law."³⁹⁴

This exception precluding review was applied to a protest of an agency decision to contract work at the military ocean terminal in Bayonne, New Jersey.³⁹⁵ The job of processing cargo had been performed by contractor personnel in conjunction with Government Civil Service personnel. Following a cost comparison study under the 1967 revision of the Circular it was determined that performance by contractor personnel would result in a substantial cost savings. The decision to convert the entire operation to contract was protested by the affected Government employees and their union.

In affirming the action of the United States District Court dismissing the class action suit for lack of subject matter jurisdiction, the Court of Appeals for the Third Circuit held that the Administrative Procedure Act did not afford the plaintiffs a judicial forum to contest studies and evaluations that formed the basis for the agency's decision.³⁹⁶ The rationale for the holding was that the agency's decision was "committed to agency discretion by law" within the meaning of the APA and thus was not subject to judicial review.³⁹⁷

The opinion indicated that the existence of broad discretionary power in an agency suggests that the challenged decision was the product of political, military, economic or managerial choices that were not susceptible to judicial review. It also noted that courts have been particularly inclined to regard as unreviewable those aspects of agency decision that involve a considerable degree of expertise or experience, or that are based on economic projections and cost analyses.³⁹⁸

Considering the provisions of 5 U.S.C. §305 and Circular No. A-76 the court concluded that it was never intended that the plaintiffs be given a judicial forum to challenge the studies and evaluations forming the basis for the agency's decision. It found that the managerial decision and the studies leading to it involved "questions of judgment requiring close analysis and nice choices." The statutory and regulatory provisions did not provide any rules or specifications that would permit a court to adjudicate disagreements with the formulas, factors and cost projections used by the agency.³⁹⁹

The statutory scheme examined in the opinion was the grant of legislative authority to executive agencies to prescribe regulations to cover "matters pertaining to the employment, direction, and general administration of personnel" The respective agencies are charged with responsibility of reviewing activities systematically to determine the degree of efficiency and economy in the operation of those activities.⁴⁰⁰ This analysis of the statute is equally pertinent today, since there has been no significant change in these provisions.

Turning to the Circular, it noted the absence of a specific standard or guideline for deciding whether savings were sufficient to justify a continuation of existing Government commercial or industrial activities. The Army regulation included factors that were required to be considered in the decision-making process and specified cost elements, but the Court found the regulation spoke only in

general terms and also contained "no precise standard" against which to measure the various options.⁴⁰¹

The Court placed great significance on the policy statement favoring private enterprise and making in-house operation the exception. It also considered the fact that the Army was implicitly permitted to consider "non-quantifiable and non-cost-related factors in deciding against continued in-house performance." For those reasons it held that neither the Circular nor the Army regulation provided sufficiently precise "rules or specifications that would permit a court to adjudicate plaintiffs' disagreements with the formulas, factors, and cost projections relied upon by the Army." The Court concluded that "... the type of decision made by the Army here is necessarily a matter of judgment and managerial discretion, and is by and large an inappropriate subject for judicial review." Therefore, it refused to review the accuracy of the cost-analysis studies made by the Army in this case.⁴⁰²

The Third Circuit decision in *Local 2855, AFGE*, considered the provisions of the Circular as they existed in 1975, the time of the cost study and solicitation. The 1979 revision affected many of the provisions upon which the court relied to demonstrate that the fundamental decisions under the Circular were committed to agency discretion. For example, the court had emphasized that the Circular did not contain any specific standards for deciding whether savings were sufficient to justify continuing an in-house Government activity.⁴⁰³ The current Circular and Cost Comparison Handbook provide more detailed guidance on procedures to be used in making cost comparison studies. As yet there has not been a judicial decision considering the effect of these changes; however, a critical analysis of the more significant changes would seem to indicate that the court would come to the same conclusion that Government make-or-buy decisions under OMB Circular No. A-76 are non-reviewable.

The 1979 revision essentially begins with a statement that judicial review is not intended as an appropriate method of relief. It provides:

This Circular provides administrative direction to heads of agency and does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular, except as specifically set forth in (the procedure for intra-agency appeals).⁴⁰⁴

Notwithstanding this language, the Circular provides that no executive agency will engage in or contract for commercial or industrial activities except in accordance with the provision of the Circular, or as otherwise provided by law.⁴⁰⁵ A decision for in-house performance based on economy must be supported by a comparative cost analysis prepared in accordance with the Circular and the detailed Cost Comparison Handbook.⁴⁰⁶ In this regard, it provides that an existing in-house activity will not be converted to contract performance on the basis of economy unless it will result in savings of at least 10% of the estimated Government personnel costs for the period of the comparative analysis.⁴⁰⁷ Likewise, a "new start" will not be approved on the basis of economy unless it will result in savings of at least 10% of Government personnel costs, plus 25% of the cost of ownership of equipment and facilities, for the period of the comparative analysis.⁴⁰⁸ The Circular also specifies cost factors to be used to calculate the cost of Government operation on the one hand, and a factor to be added to the cost of contracting to cover the Government's cost of administering the proposed contract.⁴⁰⁹

The Circular continues something of a bias against in-house performance, which was considered so significant by the Court. Activities which are not classified as "governmental functions" must meet one of three possible exceptions in order to be justified for in-house performance.⁴¹⁰ The third of these exceptions

requires the evaluation of relative costs of each method of performance as outlined above. However, explicit or implicit permission to consider non-cost-related factors in deciding against continued in-house performance has been eliminated. The Circular specifically provides that unless continuation of in-house performance is justified as the only available source or as necessary to the national defense, a "cost comparison must be conducted to determine the relative cost of Government and private performance."⁴¹¹ The only exception to this rule is that contracts with an estimated annual operating cost of less than \$100,000 "ordinarily" should be contracted without the delay and expense of a cost comparison study.⁴¹²

The general rule is not the same for new activities. If the activity is not currently being performed by Government personnel, it may be contracted without a cost comparison when in-house performance to meet a new requirement is not feasible, or when contract performance would be under an authorized set-aside program.⁴¹³ Similarly, a formalized cost study is not required for reviews of existing contracts if the agency head or his designee determines that it is not "likely" that in-house performance would be sufficiently less costly.⁴¹⁴

On the basis of these changes, it would seem the Circular does not provide "rules or specifications that would permit a court to adjudicate plaintiff's disagreements with the formula, factors, and cost projections" to be relied upon by executive agency. Agencies no longer have the extent of discretion permitted under the Circular's predecessor directives; however, the responsibility for implementation by the agency leaves sufficient discretion in the agency to preclude judicial review.

It cannot be said that the determination whether to contract for products or services or to provide them through in-house performance is not essentially a "question of judgment". It is clear that neither Congress nor the Executive branch

intended that "affected parties" be given a judicial forum to challenge the studies and evaluations contemplated by the Circular.⁴¹⁵ It remains a basic managerial tool based on a statement of Executive branch policy.

Standing

Because of the basic uncertainty surrounding future interpretations of the Circular and implementing directives as it pertains to the matter of reviewability, it also is necessary to address the issue of standing to contest agency decisions. The court cases which have considered reviewability of contracting-out decisions have involved only suits brought by affected employees and their unions.⁴¹⁶ Requests for declaratory judgment or injunction also might involve disappointed bidders, either contesting award to another bidder or a decision to perform a commercial or industrial activity in-house with Government personnel.⁴¹⁷

In order to demonstrate the requisite standing to obtain review of these decisions, plaintiffs must allege and be able to prove that the challenged action has caused them injury in fact, economic or otherwise. Secondly, they must be able to show that the interest they seek to protect is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.⁴¹⁸ The landmark decision in Seanwell Laboratories, Inc. v. Shaffer, *supra*, clearly established that an unsuccessful bidder had standing to have the propriety of the rejection of his bid considered by the courts under the Administrative Procedure Act. On the issue of standing, that case provides authority for unsuccessful bidders to question a decision to perform a commercial or industrial activity in-house with Government personnel.⁴¹⁹

The issue of whether a Government employee who might lose his job if the work is contracted-out has the standing to contest that decision is not as clearly settled. Only two reported United States District Court cases have squarely

addressed the question, and they have reached opposite conclusions. However, in light of the specialized fact situations these cases are not inconsistent in logic or result.

In Lodge 1858, American Federal of Government Employees v. Paine, 141 U.S. App. D.C. 152, 436 F.2d 882 (1970), the Court of Appeals for the District of Columbia found that plaintiff Government employees had standing to seek judicial review of a decision to contract for certain support services at the Marshall Space Flight Center in Huntsville, Alabama. It should be noted that the complaint alleged that the contracts were illegal in that they replaced Civil Service employees with contractor employees in positions assigned by law to federal civil servants only. It did not involve allegations that the requirements for conducting cost comparisons or other provisions of Circular No. A-76 were violated.⁴²⁰

On the issue of standing to bring the action, the suit focused on the second prong of the dual test for standing. The question was whether specific statutes creating the National Aeronautical and Space Administration (NASA) and excepting certain jobs within the agency from Civil Service laws brought the plaintiff employees "arguably within the zone of interest to be protected or regulated."⁴²¹ With relatively little discussions of the matter the Court concluded that the statutes bestowed standing upon the individual appellants, and their union as their representative, to contest the legality of NASA's implementation of its work force through service support contracts.⁴²²

In American Federation of Government Employees, Local 1858. v. Callaway, 398 F. Supp. 176 (1975), The United States District Court for the Northern District of Alabama granted a request by Civil Service employees and their union for a preliminary injunction to prevent the Army from effecting a reduction in force and to preclude award of private contracts which would cause a

reduction in force. After a hearing on the merits the Court denied a motion for permanent injunction and dissolved the preliminary injunction. Among other things the Court held that the plaintiffs lacked standing to challenge the reduction in force or the decision to contract for the needed services.⁴²³

The decision of the Court applied the same dual-pronged test for standing. The plaintiffs were required to show both an "injury in fact, economic or otherwise," and "that the interest they seek to protect is arguably within the zone of interests to be protected or regulated...." The Court concluded that the plaintiffs satisfied neither of these tests.⁴²⁴

The Court's decision with regard to the first test resulted from its conclusion that the employees failed to sufficiently demonstrate the capability of the class of Government employees to perform the work covered by the contracts. It also found that the facts presented did not show that absent the contracts the work would have been done in-house at that facility. These elements focused on causation. The opinion indicated that the plaintiffs failed to draw the line of causation between their alleged injury in fact and the agency's actions.⁴²⁵

This aspect of the decision raises questions whether any plaintiff could satisfy the requirement to show that the work would be done by one particular method "but for" the agency decision. The Circular specifically provides that any one of three methods have been successful in the past. These are use of military personnel, civilian employees of the agency and contractor personnel.⁴²⁶ In addition, the Circular provides certain circumstances under which the needed products or services may be obtained from other federal agencies.⁴²⁷ This problem is particularly difficult to overcome for challenges by Government employees, for in those cases in which in-house operation would be authorized, inter-agency provision of goods or services would also be allowed.⁴²⁸

The decision of the Court on the zone of interest element directly involved judicial interpretation of the 1967 version of Circular No. A-76 and implementing directives. The Court found that these regulations and directives constituted managerial and policy tools to aid in the procurement of supplies and services for the federal government and military services. It held that they were not intended to provide benefits to the plaintiffs. Rather they were promulgated to promote the efficient functioning of the military establishment and the economy of the service.⁴²⁹

Despite the changes in the Circular when it was reissued in 1979, this rationale would seem to be equally valid today. The Circular clearly states that it functions as administrative direction to the heads of executive agencies, and that it is not meant to create any substantive or procedural basis for any person to seek extra-agency review of action or inaction on covered matters.⁴³⁰

OBSERVATIONS AND CONCLUSIONS

Office of Management and Budget (OMB) Circular No. A-76 (1979) sets forth relatively detailed standards to guide procuring agencies in deciding whether to provide goods and services through in-house performance by Government employees, or to obtain them from private industry through "contracting out". The policy statement it contains builds on three, co-equal principles or precepts. These are (1) reliance on the private sector to supply the Government's needs; (2) performance of governmental functions by Government employees; and (3) use of cost comparisons to assure that all non-governmental functions are performed in the most efficient and cost-effective manner.

Reliance on private, commercial businesses to provide products and services has been part of the Executive branch policy since the issuance of the first Bureau of the Budget Bulletin in 1955. The original statement has remained virtually intact throughout the intervening years and the subsequent modifying directives. Despite this fact, it cannot be said that the policy in actual practice has remained the same.

The present Circular evolved from the original policy of virtually complete reliance on private businesses, which de-emphasized cost considerations. The change or shift in that policy came about through addition and modification of exceptions and redefinition of key terms. The end product is the total exclusion of a category of "governmental functions" from the application of the Circular's provisions, and the increased emphasis on cost comparison studies to ensure economic operation of commercial and industrial activities.

Much of the motivation for this pattern of change came from external sources. It also characteristically involved collateral issues rather than disagreement with the stated policy. Congressional interest and concern over the implementation of the program and its effect on Government employees has been the strongest, recent motivator. During the 1950's and 1960's the primary interest of Congress seemed to be the protection of small business through increased elimination of Government competition. More recently feedback and input from Congressional committees often has demonstrated diverse sentiments on the course of proposed changes.

Perhaps the increasing emphasis on objective criteria, such as cost studies, to determine how to perform needed work is a reflection of the emotional, and diametrically opposed, positions of the interested parties. Both private industry and its employees and Government employees agree that the Government is justified in providing its needed products and services in the most economic and efficient manner available. However, the mechanics of assigning and comparing costs for the alternative methods of performance has remained a troublesome problem.

To alleviate some of the tensions associated with these reviews of activities and the cost comparison studies the revised Circular "laid bare" certain compromises or biases. The review procedure for existing activities, whether currently performed in-house or by contract, favors the status quo. Entirely new activities are essentially pushed toward contract performance. In this way fewer personnel adjustments are expected.

In actual practice, the Circular has not been tested by experience. Congressional concern about the potential impact on the extremely large volume of activities in the Department of Defense has resulted in restraints and a mora

torium on implementation of the Circular's current program within DOD. Fiscal Year 1980 beginning in October, 1979, marked the beginning of DOD's implementation efforts. The early results of those efforts indicate the compromise portion of the Circular's application to existing activities was no compromise at all. While only a very few cost studies have been completed and final action taken, approximately 85-90 % of the existing Government commercial or industrial activities subjected to review will result in conversion to contract. There have been no reversions from contract performance to Government operation.

The impact of these conversions will become more apparent as more studies are completed. Any significant increase in conversions probably will trigger an increase in requests for review of these decisions by the affected employees and their unions. The same result has not been true for contractors who have to provide bid in cases where submit bid or offer for their activities which remained in-house. A possible explanation is that the number is so insignificant that there has not been a large enough sample upon which to base a conclusion. On the other hand, it is possible that private firms have not recognized the similarity between the Government's position and that of another private bidder. At this point these companies may still consider the decision unassailable.

The avenues of appeal for either party are rather strictly limited. The Circular provides for an internal "audit" of the Government's in-house estimate and for an intra-agency appeal. The appeals mechanism is equally available to bidders or offerors, their employees and Government employees. It gives an affected party the right to have any decision made under the Circular and its rationale reviewed by an independent party superior to the decision-maker. The decision on the appeal is final within the agency.

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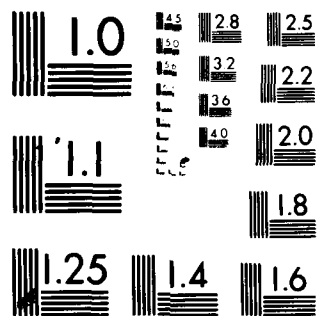
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The alternative sources of review are the General Accounting Office and the federal courts. While these avenues have been opened to disappointed bidders, the question of the appropriateness of the agency's decision on the method of performance has not been considered appropriate for review. Up to this point only the question of compliance with cost comparison requirements for solicited bids has been accepted for review by the GAO. The courts have not decided any cases on the merits of the issue presented.

The conclusion that might be drawn from this discussion is that Government employees or their representatives will not be able to overcome the reluctance of federal courts to get involved in contracting decisions of executive agencies. This is especially true for the military departments when such decisions are bound up with considerations of national defense.

Even under the revised Circular the agencies have some latitude in deciding what method to use to supply products or services needed by the Government. This discretion, in addition to providing a basis for exemption from the provisions for judicial review under the APA, makes it extremely difficult for Government employees to demonstrate a nexus between their termination and the contracting decision.

Even though some courts may not take as restrictive an attitude toward the causation element, the Circular itself provides the greatest stumbling block to the standing of those employees to seek review. It is administrative and managerial guidance for agency heads. So long as the courts view the contracting decision as separate from the personnel actions which follow, affected employees are not within its protected zone of interest. While they may possess a limited property interest in their jobs, Circular No. A-76 does not provide a right to retain those jobs even if the contracting decision is based on a faulty cost comparison.

The final question if this conclusion is correct is whether the Circular is enforceable at all. To the extent that the contested action involves dependence on the procurement system, GAO will provide a forum for disappointed bidders. With some reluctance, and possibly deference to a GAO decision, bidders may also seek declaratory and injunctive relief from the federal courts. However, this method has been singularly unsuccessful in the past for affected Government employees, and unused by potential contractors.

What remains is virtually complete reliance on the integrity and good faith of agency officials charged with responsibility for implementing Circular No. A-76. Through the accurate and honest inventorying and periodic review process they control the effectiveness of the program and the outcome of the decision-making process. Only the mechanism for appeals to an independent superior within the agency and the high-level attention given the program by Congress and OFPP provide the assurance that all parties will receive equitable treatment.

FOOTNOTES

¹Office of Management and Budget (OMB) Circular No. A-76 (March 29, 1979), 44 Fed. Reg. 20556 (1979).

²The Executive branch policy has evolved through four directives, which include three bulletins and one circular issued by the Bureau of the Budget and later the Office of Management and Budget.

- (a) Bulletin No. 55-4, Jan. 15, 1955;
- (b) Bulletin No. 57-7, Feb. 5, 1957;
- (c) Bulletin No. 60-2, Sept. 21, 1959;
- (d) Circular No. A-76, Mar. 3, 1966 as revised or amended by:
 - Transmittal Memorandum No. 1, Aug. 30, 1967;
 - Transmittal Memorandum No. 2, Oct. 18, 1976;
 - Transmittal Memorandum No. 3, June 13, 1977;
 - Transmittal Memorandum No. 4, Mar. 29, 1979.

[The functions and responsibilities of the Bureau of the Budget were transferred to the Office of Management and Budget by Executive Reorganization Plan No. 2 of 1970, §102 (Mar. 12, 1970) 35 Fed. Reg. 7959 (1970)].

³Administrative Procedure Act (APA), 5 U.S.C. §701 et seq. (1976).

⁴OMB Circular No. A-76 ¶ 2, 44 Fed. Reg. 20557-20558 (1979).

⁵The Office of Federal Procurement Policy (OFPP) was established in the Office of Management and Budget (OMB) by Public Law 93-400, §5, 88 Stat. 796. OFPP provides overall procurement policy direction for Executive agencies in accordance with applicable laws. One of its specific functions was "monitoring and revising policies, regulations, procedures, and forms relating to reliance . . . on the private sector to provide needed property and services . . ." [Pub. L. 93-400, §6(d)(3), *supra*]. However, when Congress extended the life of OFPP in the Office of Federal Procurement Policy Act Amendments of 1979, [Pub. L. 96-83, 93 Stat. 648] the quoted language was deleted. The revised Circular No. A-76 was issued under the amended version of the Act.

⁶The current Circular provides:

No executive agency will engage in or contract for commercial or industrial activities except in accordance with the provisions of this Circular, or as otherwise provided by law [A-76, ¶6a].

⁷Adam Smith's Moral and Political Philosophy (H.W. Scheider ed. 1948, First Harper Torchbook edition, Harper and Row Publishers, Inc., New York, New York 1970).

⁸Id. at 814.

⁹The Works of Alexander Hamilton (Henry Cabot Lodge ed., G.H. Putnam Sons, 2nd ed., New York, New York 1904).

¹⁰H.R. Rep. No. 1985, 72d Cong., 2d Sess. (1933);
H.R. Rep. No. 1197, 83d Cong., 2d Sess. (1954)

¹¹See generally Staff of the Senate Comm. on Government Operations, 88th Cong., 1st Sess., Study of Government Competition with Private Enterprise (Comm. Print 1963). [hereinafter cited as 1963 Staff Study] [micro-fiche S1383].

¹²Id. at 4.

¹³H.R. Rep. No. 658, 82d Cong., 1st Sess. 7-8 (1951); H.R. Rep. No. 1197, supra note 10, at 4.

¹⁴H.R. Rep. No. 1985, supra note 10.

¹⁵Id. at 24.

¹⁶1963 Staff Study, supra note 11, at 14-24.

¹⁷Id.

¹⁸Department of Defense (DOD) Directive 4000.8 (1952).

¹⁹100 Cong. Rec. 567 (1954) [Budget message of President Eisenhower delivered to a joint session of Congress on Jan. 21, 1954].

²⁰Id. at 567-574. President Eisenhower was credited with making similar statements during his presidential campaign early in 1952. He had indicated that no federal project would be undertaken which the people could effectively do or be helped to do for themselves, and that no federal project would be undertaken which private enterprise could effectively undertake. [1963 Staff Study, supra note 11, at 24.]

²¹Bureau of the Budget (BOB) Bulletin No. 55-4, ¶ 2 (1955).

²²See note 2 supra.

²³The Commission on Government Procurement was created by Public Law No. 91-129 in November 1969 to study and recommend to the Congress methods "to promote the economy, efficiency, and effectiveness" of procurement by the Executive branch. [Pub. L. No. 91-129, §1, 83 Stat. 269 (1969)].

²⁴"Report of the Commission on Government Procurement," vol. 1, ch. 6 (U.S. Government Printing Office, Wash, D.C., Dec. 1972).

²⁵See note 5 supra. GAO Report, Legislative Recommendations of the Commission on Government Procurement: 5 Years Later, PSAD-78-100, at 3-4 (1978).

- ²⁶Pub. L. 93-400, §6(d)(3), supra note 5.
- ²⁷Weekly Compilation of Presidential Documents, Vol 12, pt. 11, at 1686 (1976).
- ²⁸OMB Budget Procedures Memorandum, August, 1976.
- ²⁹OMB Circular No. A-113 (1976).
- ³⁰See note 2 supra. The Memorandum announced this guidance "for the convenience of Federal agencies making cost studies . . ." Use of the standard cost factors in computing the costs of civilian personnel services was made mandatory. [Transmittal Memorandum No. 2, supra note 2, ¶ 4a (1976)].
- ³¹Transmittal Memorandum No. 3, supra note 2, ¶ 3 (1977).
- ³²See history of in GAO Report, Development of a National Make-or-Buy Strategy -- Progress and Problems, PSAD 78-118, at 19-20 (1978).
- ³³Transmittal Memorandum No. 3, supra note 2, ¶ 4 (1977).
- ³⁴42 Fed. Reg. 59814 (1977). Also see BNA Fed. Cont. Rep. (News), No. 686, A-32, 33 (June 20, 1977).
- ³⁵42 Fed. Reg. 59814 (1977).
- ³⁶Id. at 59814-59826.
- ³⁷43 Fed. Reg. 37410 (1978).
- ³⁸See Hearings on Military Posture and H.R. 10929, Department of Defense Authorization for Appropriations for FY 1979 Before the House Comm. on Armed Services, 95th Cong., 2d Sess., pt. 3, bk. 2, at 1874 (1978).
- ³⁹44 Fed. Reg. 20556 (1979).
- ⁴⁰See The Works of Alexander Hamilton, supra note 9.
- "Thrift may be the handmaid and nurse of Enterprise. But equally she may not . . . For the engine which drives Enterprise is not Thrift, but Profit." John Maynard Keynes, A Treatise on Money (1930).
- ⁴¹OMB Circular No. A-76, ¶ 4, 44 Fed. Reg. 20558 (1979).
- ⁴²Id.
- ⁴³Id. at ¶ 4a.
- ⁴⁴BOB Bulletin No. 55-4, ¶ 2 (1955).

⁴⁵Id.

⁴⁶Id. at ¶ 6.

⁴⁷White House Press Release (Oct. 27, 1956). See 1963 Staff Study, supra note 11, at 27.

⁴⁸1963 Staff Study, supra note 11, at 28.

⁴⁹See H.R. Rep. No. 1197, supra note 10, at 4-5; S. Rep. No. 129, 84th Cong., 1st Sess. (1955) [CIS US SERIAL SET No. 11815, fiches 12 and 13]; S. Rep. No. 1015, 85th Cong., 1st Sess. (1957) [CIS US SERIAL SET No. 11979, fiche 3].

⁵⁰BOB Bulletin No. 57-7, at ¶ 2 (1957); BOB Bulletin No. 60-2, ¶ 2 (1959).

⁵¹BOB Bulletin No. 57-7, ¶ 4 (1957).

⁵²BOB Bulletin No. 60-2, ¶ 3 (1959).

⁵³Id.

⁵⁴Id. at ¶ 3A.

⁵⁵Id. at ¶ 3B; In testimony before a subcommittee of the Senate Select Committee on Small Business in May, 1960, Mr. Elmer B. Staats, then Deputy Director of the Bureau of the Budget, reviewed the policy and program of the Executive branch to reduce Government competition with private enterprise. With respect to cost comparisons, he stated:

We found that the cost of Government operation and private procurement could be usefully compared provided they were both fairly computed and complete. Costs assigned to Government operation, in order to be comparable, would have to cover all direct and indirect outlays as well as elements not usually chargeable to current appropriations. Costs attributed to procurement from private sources would also have to be computed on an equally fair and complete basis. We realized that some cost items could only be estimated; therefore, the principle was developed that procurement should be from commercial sources unless the differences in comparable costs was (sic) relatively large and disproportionate. [S. Rep. No. 1948, 86th Cong., 2d Sess., at 5 (1960)] [CIS US SERIAL SET No. 12238, fiche 14].

⁵⁶BOB Bulletin No. 60-2, ¶ 3B (1959).

⁵⁷Id. at ¶ 3.

⁵⁸Id. at ¶ 3C.

⁵⁹Id. at ¶ 3C(2).

⁶⁰H.R. Rep. No. 129,, 89th Cong., 1st Sess., at xi (1965) [CIS US SERIAL SET No. 12667-2, fiche 5].

⁶¹See GAO Report, Development of a National Make-or-Buy Strategy, supra note 32, at 60-63 (1978).

⁶²GAO Report, Excessive Costs Incurred in Using Contractor-Furnished Personnel Instead of Government Personnel by the Pacific Region of the Ground Electronics Equipment Installation Engineering Agency, Air Force Logistics Command, Department of the Air Force (1964).

⁶³Letter from the General Counsel of the Civil Service Commission to the Comptroller General of the United States, Feb. 12, 1965 [Fuchu opinion], reprinted at Comp. Gen. Dec. B-146824 (Mar. 4, 1965); also reprinted at H.R. Rep. 188, 89th Cong., 1st Sess., at 2 (1965) [CIS US SERIAL SET NO. 12667-2, fiche 8].

⁶⁴Report of the Contract Support Services Project to the Secretary of Defense (Mar. 1965) [Moot Report].

⁶⁵See H.R. Rep. 129, supra note 60, at 35. Also see BNA Fed. Cont. Rep. (News), No. 69, A-1, 2, June 14, 1965.

⁶⁶See BNA Fed. Cont. Rep. (News), No. 55, A-15,, 16, Mar. 8, 1965; BNA Fed. Cont. Rep. (News), No. 78, A-14, 15, Aug. 16, 1965; and BNA Fed. Cont. Rep. (News), No. 94, A-10, 11, Dec. 6, 1965 (discussiong reactions to H.R. 10368, 89th Cong., 1st Sess. (1965) and H.R. 10420, 89th Cong., 1st Sess. (1965) designed to restrict the use of personal service contracts by federal agencies).

This same debate has continued through the intervening period to the present time. See House Comm. on Government Operations, 90th Cong., 1st Sess., Government-wide review of Certain Support Service Contracts, Part I - NASA (Comm. Print 1967) [fiche H 1107]; Senate Comm. on Government Operations, 90th Cong., 2d Sess., Policy and Practice with Respect to Contracts for Technical Services: Status Report (Comm. Print 1968) [fisch S 1384]; BNA Fed. Cont. Rep., No. 193, E-1, 5, Oct. 30, 1967; Hearings on H.R. 4717 Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess. (1979).

⁶⁷See GAO Report, Development of a National Make-or-Buy Strategy, supra note 32, at 95 (1978).

⁶⁸See BNA Fed. Cont. Rep. (News), No. 107, A-12, 13, Mar. 7, 1966.

⁶⁹Memorandum from the President to Heads of Departments and Agencies, Weekly Compilation of Presidential Documents, Vol. 2, Part 1, at 316 (Mar. 7, 1966).

⁷⁰BOB Circular No. A-76, ¶ 2 (1966).

⁷¹Id. at ¶ 5.

⁷²BOB Bulletin No. 60-2, ¶ 3c (1959).

⁷³BOB Circular No. A-76, ¶ 5a (1966).

⁷⁴Id. at ¶ 5d.

⁷⁵Id. at ¶ 5e. Bulletin No. 60-2 weighted cost considerations heavily in favor of contracting, while the "higher cost" standard to justify in-house performance under Circular No. A-76 was based on "a comparative cost analysis which will disclose as accurately as possible the difference between the costs . . . under each alternative." [BOB Circular No. A-76, ¶ 6 (1966)].

⁷⁶BOB Circular No. A-76, ¶ 7b(3) and ¶ 7c(3) (1966).

⁷⁷BNA Fed. Cont. Rep. (News), No. 107, A-12, 13, Mar. 7, 1966; Fed. Pubs., Inc., The Govt Contractor, vol 8, ¶ 124, Mar. 14, 1966.

⁷⁸GAO Report, Development of a National Make-or-Buy Strategy, supra note 32, at 23-38 (1978).

⁷⁹OMB Circular No. A-76, ¶ 6b, 44 Fed. Reg. 20558 (1979).

⁸⁰Id. at 44 Fed. Reg. 20556 (1979).

⁸¹The process for administrative reviews of agency determinations applies to those decisions "make under this Circular." [OMB Circular No. A-76, ¶ 11a, 44 Fed. Reg. 20561 (1979)]. However, by its terms the provisions of the Circular do not apply to governmental functions. [Id. at ¶ 6b, 44 Fed. Reg. 20558].

⁸²Inventories and schedules for review of commercial and industrial activities are available for public scrutiny, but governmental functions are not subject to these requirements and are not necessarily identified in other public documents as such. [Telephone interview with Mr. Ken Gerken, Office of Federal Procurement Policy, April, 1980].

⁸³OMB Circular No. A-76, ¶ 5f, 44 Fed. Reg. 20558 (1979).

⁸⁴Id. at ¶ 5f(1).

⁸⁵See BOB Bulletin No. 55-4, ¶ 4b (1955); BOB Bulletin No. 57-7, ¶ 3a (1957); BOB Bulletin No. 60-2, footnote 1 (1959).

⁸⁶As a practical matter, the exclusion of "core capabilities" is limited to research, development and testing activities which, though covered by the provisions of the Circular as written, are subject to an indefinite moratorium on application. [See Transmittal Memorandum No. 4, supra note 2, 44 Fed. Reg. 20557 (1979); Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, Title VIII, §802, 93 Stat. 811 (1979)]. While the deferral of application of the Circular to R&D activities of executive agencies was set at one year by the Circular, OFPP has informally extended the deferral for agencies outside of DOD pending further study. [See text accompanying notes 162-165 infra].

⁸⁷OMB Circular No. A-76, ¶ 5f(3), 44 Fed. Reg. 20558 (1979).

⁸⁸See note 82 supra. The premise upon which the "loophole" rests is that implementation of the Circular is the responsibility of the agency officials likely to be affected directly or indirectly by the ultimate decision whether to contract work rather than continue performance in-house. Experience has clearly demonstrated that such decisions are often accompanied by emotional responses from workers and unions, and this is recognized by the Circular. The point of the discussions is not that agency officials will actively seek such loopholes to thwart the policy of the Circular, but that the only element of complete discretion left to these officials is in the identification of "governmental functions."

⁸⁹Testimony during Congressional hearings held prior to issuance of A-76 in its final form made it apparent that the aim of the Circular was to create trade-offs between the two alternatives. The cost differentials stated in the Circular were to have the effect of preserving the status quo. However, for "new starts" the bias would admittedly favor contracting with a private enterprise. See Hearings on Military Posture and H.R. 10929, supra note 38, at 1887, 1890.

⁹⁰Hearings on H.R. 4717, supra note 66, at 117.

⁹¹Id.

⁹²See discussion of these distinctions made by Rep. H. Harris during testimony of Mr. Bowman Cutter, Id. at 117-119.

⁹³OMB Circular No. A-76, ¶ 8, 44 Fed. Reg. 20559 (1979).

⁹⁴Id. at ¶ 8a.

⁹⁵Id. at ¶ 8a(1)(b).

⁹⁶BOB Bulletin No. 60-2, ¶ 3c(1) (1959).
BOB Circular No. A-76, ¶ 5a (1966).

⁹⁷OMB Circular No. A-76, ¶ 8a(2), 44 Fed. Reg. 20559 (1979).

⁹⁸Id. at ¶ 8a(3).

⁹⁹Id. at ¶ 8a(3)(d).

¹⁰⁰Id.

¹⁰¹OMB Circular No. A-76, ¶ 8b, 44 Fed. Reg. 20559 (1979).

¹⁰²Id. at ¶ 8b(2).

¹⁰³Id.

¹⁰⁴See OMB Circular No. A-76, ¶ 5f, 44 Fed. Reg. 20558 (1979) (definition of "Governmental function.")

¹⁰⁵The exclusion for the "In-house core capabilities as governmental functions is limited to the area of research, development and testing "needed for technical analysis and evaluation or technology base management and maintenance." However, it applies to both civilian and military agencies. On the other hand, the exception for national defense is limited to technical competence and resources "necessary to meet military contingencies."

¹⁰⁶See GAO Report, Development of a National Make-or-Buy Strategy, *supra* note 32, at 60-63 (1978); and "Report of the Commission on Government Procurement," vol. 1, ch. 6 (U.S. Government Printing Office, Wash., D.C., Dec. 1972).

¹⁰⁷OMB Circular No. A-76, ¶ 9b, 44 Fed. Reg. 20560 (1979).

¹⁰⁸*Id.* at ¶ 9a(3), 44 Fed. Reg. 20559.

¹⁰⁹*Id.* at ¶ 9a(2), 44 Fed. Reg. 20559.

¹¹⁰*Id.* at ¶ 9d, ¶ 9e.

¹¹¹See BOB Circular No. A-76, ¶ 5d (1979).

¹¹²OMB Circular No. A-76, ¶ 7b, 44 Fed. Reg. 20559 (1979).

¹¹³*Id.* at ¶ 7b(1).

¹¹⁴*Id.* at ¶ 7b(2).

¹¹⁵*Id.* at ¶ 7c.

¹¹⁶*Id.* at ¶ 7b(2), ¶ 7c.

¹¹⁷See Hearings on Military Posture and H.R. 10929, *supra* note 38, at 1878-1880, 2006, 2106, 2151; GAO Report, Development of a National Make-or-Buy Strategy, *supra* note 32, at 23.

¹¹⁸OMB Circular No. A-76, ¶ 6a provides as follows:

No executive agency will engage in or contract for commercial or industrial activities except in accordance with the provisions of this Circular . . . [¶ 6a, 44 Fed. Reg. 20558].

¹¹⁹*Id.* at ¶ 5a.

¹²⁰*Id.* at ¶ 5e.

¹²¹OMB Circular No. A-76, Attachment A, 44 Fed. Reg. 20561-62 (1979).

¹²²BOB Bulletin No. 55-4, ¶ 4b (1955).

¹²³*Id.*

¹²⁴Id.

¹²⁵BOB Bulletin No. 57-7, ¶ 3a (1957).

¹²⁶BOB Bulletin No. 60-2, ¶ 3c(2) (1959).

¹²⁷BOB Bulletin No. 60-2, ¶ 3 (1959).

¹²⁸See BOB Circular No. A-76, ¶ 5c (1966).

¹²⁹Id.

¹³⁰See text accompanying note 119 supra.

¹³¹See OMB Circular No. A-76, ¶ 8a, 44 Fed. Reg. 20559 (1979).

¹³²See text accompanying notes 179-180, and 184-189 infra.

¹³³BOB Bulletin No. 55-4, ¶ 4e (1955).

¹³⁴Id.

¹³⁵BOB Bulletin No. 57-7, ¶ 3b (1957); and BOB Bulletin No. 60-2, footnote 1 (1959).

¹³⁶BOB Bulletin No. 57-7, ¶ 3b (1957).

¹³⁷BOB Circular No. A-76, ¶ 3d (1966).

¹³⁸BOB Circular No. A-76, ¶ 3d (1967).

¹³⁹While products or services for the use of executive agencies were outside the "scope" of the Circular, the 1966 and 1967 versions specifically stated that the agencies "should apply the provisions of this Circular with respect to any commercial or industrial products or services which it uses." [¶ 3d]. The apparent intent was to apply the policy in the decision-making process, but to exclude those activities from the inventory and review requirements. This is the same approach adopted by the 1979 version of the Circular for governmental functions. See note 80 supra and text accompanying.

¹⁴⁰OMB Circular No. A-76, ¶ 4a, 44 Fed. Reg. 20558 (1979).

¹⁴¹See text accompanying note 112 supra.

¹⁴²OMB Circular No. A-76, ¶ 6(5), 44 Fed. Reg. 20558 (1979).

¹⁴³Id.

¹⁴⁴OMB Circular No. A-120, 45 Fed. Reg. 30197 (1980).

¹⁴⁵Id. at ¶ 3, 45 Fed. Reg. 30198.

¹⁴⁶OMB Circular No. A-109, (April 6, 1976).

¹⁴⁷OMB Circular No. A-76, ¶ 6(4), 44 Fed. Reg. 20558 (1979).

¹⁴⁸Specific reference to ADP is found in provisions of the Circular dealing with use of products and services from other agencies. OMB Circular No. A-76, ¶ 7a, 44 Fed. Reg. 20558 (1979).

¹⁴⁹Id.

¹⁵⁰Transmittal Memorandum No. 4, supra note 2, 44 Fed. Reg. 20557.

¹⁵¹Id.

¹⁵²Id.

¹⁵³"Acquiring of Commercial or Industrial Products and Services Needed by the Government: Application to Research and Development Activities," 45 Fed. Reg. 1952 (1980).

¹⁵⁴Id. at 45 Fed. Reg. 1953.

¹⁵⁵Id.

¹⁵⁶Id.

¹⁵⁷Id.

¹⁵⁸Id.

¹⁵⁹Id. at 45 Fed. Reg. 1954.

¹⁶⁰Department of Defense, Dissenting View, (Jan. 4, 1980), reprinted in BNA Fed. Cont. Rep., No. 814, D-2, 4, Jan. 14, 1980.

¹⁶¹H.R. Rep. No. 1118, 95th Cong. 2d Sess., at 65 (1978).

¹⁶²Pub. L. No. 96-107, § 802, 93 Stat. 811 (1979), reprinted at 1 U.S. Cong. News '79.

¹⁶³Id.

¹⁶⁴Subsection (c) of § 802 provides as follows:

(c) No law enacted after the date of the enactment of this Act shall be held, considered, or construed as amending, superseding, or otherwise modifying any provision of this section unless such law does so by specifically and explicitly amending, repealing, or superseding this section. [Id. at 93 Stat. 811].

¹⁶⁵Telephone interview with Mr. Ken Gerken, Office of Federal Procurement Policy, April, 1980.

¹⁶⁶OMB Circular No. A-76, ¶ 5a, 44 Fed. Reg. 20558 (1979).

¹⁶⁷See BOB Bulletin No. 55-4, ¶ 4d (1955).

¹⁶⁸BOB Bulletin No. 57-7, ¶ 5c (1957).

¹⁶⁹BOB Bulletin No. 60-2, ¶ 4A (1959).

¹⁷⁰OMB Circular No. A-76, ¶ 6c, 44 Fed. Reg. 20558 (1979).

¹⁷¹OFPP still anticipates issuing supplemental guidance on treatment of GOCO activities; however, this project is not expected to be completed in the near future. [Interview with Mr. Ken Gerken, Office of Federal Procurement Policy, April, 1980].

¹⁷²OMB Circular No. A-76, ¶ 10b, 44 Fed. Reg. 20560 (1979).

¹⁷³Id. at ¶ 10c, 44 Fed. Reg. 20560-61.

¹⁷⁴See text accompanying note 117 supra.

¹⁷⁵44 Fed. Reg. 20557 (1979) (Supplementary Information accompanying OMB Circular No. A-76).

¹⁷⁶Id.

¹⁷⁷OMB Circular No. A-76, ¶ 10a, 44 Fed. Reg. 20560 (1979).

¹⁷⁸Id. at ¶ 10a(3). The DAR Council has taken the position that policies issued by OFPP are not binding on the military departments unless implemented by the Council. [See Army Acquisition Letter 80-14 (May 30, 1980), CCH Govt. Cont. Rep. ¶ 79,299.55].

¹⁷⁹OMB Circular No. A-76, ¶ 10b(1), 44 Fed. Reg. 20560 (1979).

¹⁸⁰Id. at ¶ 10b(2).

¹⁸¹Id.

¹⁸²Id.

¹⁸³OMB Circular No. A-76, ¶ 10b, 44 Fed. Reg. 20560 (1979).

¹⁸⁴Id. at ¶ 10c.

¹⁸⁵Id. at 10c(1).

¹⁸⁶See text accompanying note 80 supra.

¹⁸⁷OMB Circular No. A-76, ¶ 8a, 44 Fed. Reg. 20559 (1979).

¹⁸⁸Id. at ¶ 8b.

¹⁸⁹Id. at ¶ 10c(1), 44 Fed. Reg. 20560.

¹⁹⁰Id. at ¶ 10c(2), 44 Fed. Reg. 20561.

¹⁹¹Id.

¹⁹²Id. at ¶ 10c(5), 44 Fed. Reg. 20561.

¹⁹³OMB Circular No. A-76, ¶ 9 provides:

A decision for in-house performance based on economy must be supported by a comparative cost analysis... [44 Fed. Reg. 20559]

¹⁹⁴OMB Circular No. A-76, 28c, 44 Fed. Reg. 20559 (1979).

¹⁹⁵See OMB Circular No. A-76, ¶ 9d, e, 44 Fed. Reg. 20560 (1979); See text accompanying notes 230-236 infra.

¹⁹⁶BOB Bulletin No. 55-4, ¶ 6 (1955).

¹⁹⁷See notes 47 and 48 supra.

¹⁹⁸See H.R. Rep. No. 1197, supra note 10, at 4-5.

¹⁹⁹See H.R. Rep. No. 688, 86th Cong., 1st Sess. (1959) [CIS US SERIAL SET No. 12161, fiche 13].

²⁰⁰See S. Rep. No. 1948, supra note 55, at 5.

²⁰¹H.R. Rep. No. 688, supra note 199.

²⁰²See H.R. Rep. No. 1985, supra note 10 at 15-16.

²⁰³BOB Bulletin No. 57-7, ¶ 1 (1957).

²⁰⁴Id. at ¶ 4.

²⁰⁵Id.

²⁰⁶BOB Bulletin No. 60-2, ¶ 3 (1959).

²⁰⁷Id. at ¶ 3B.

²⁰⁸Examples of costs to be considered were listed as follows:

... pay and other allowances for personal services and leave; contributions for retirement and disability;

supplies, materials; transportation; warehousing; utilities; maintenance; repairs, and similar factors. Appraisal of elements not usually chargeable to current appropriations, such as depreciation, interest on the Government's investment, the cost of self-insurance (even though it is unfunded), and exemption from Federal, State, and local taxes must also be made to the extent necessary to put the costs on a comparable basis. Id. at ¶ 3B.

²⁰⁹BOB Bulletin No. 60-2, ¶ 3B (1959).

²¹⁰Id. The Bulletin specifically provided that there was a presumption in favor of contracting and a strict comparison of costs alone would not overcome that presumption.

²¹¹Such practices were not only allowed, but encouraged under Bulletin No. 60-2. See H.R. Rep. No. 129, supra note 60, at xi.

²¹²The provisions and policies of the bulletins were written in terms of prohibitions against Government operation, except under limited circumstances. [See BOB Bulletin No. 60-2, ¶ 2 (1959)]. There was no limitation placed on the discretion to contract, even in the face of potentially higher costs. Bulletin No. 60-2 expressly recognized management reasons to contract for needed products or services "regardless of cost factors" [BOB Bulletin No. 60-2, ¶ 3B (1959)].

²¹³GAO Report, Excessive Costs Incurred in Using Contractor-Furnished Personnel . . . , supra note 62.

²¹⁴See test accompanying notes 61-65 supra.

²¹⁵Staff Memo 90-1-8, Senate Government Operations Committee, March 1, 1967.

²¹⁶See Presidential Memo, supra note 69.

²¹⁷BOB Circular No. A-76, ¶ 6 (1966).

²¹⁸Id.

²¹⁹Id.

²²⁰Transmittal Memorandum No. 1, supra note 2 (first unnumbered paragraph).

²²¹BOB Circular No. A-76, ¶ 6 (third unnumbered paragraph) (1967).

²²²See text accompanying notes 30 and 31 supra.

²²³OMB Circular No. A-76, ¶ 4, 44 Fed. Reg. 20558 (1979).

²²⁴Supplementary Information, 44 Fed. Reg. 20556 (1979), (Summary).

²²⁵Cost Comparison Handbook, Supplement No. 1 to OMB Circular No. A-76 (1979).

²²⁶See GAO Report, Development of a National Make-or-Buy Strategy, supra note 32, at 149. However, GAO favored a flexible threshold for increases in capital investment or annual cost of production. Id.

²²⁷OMB Circular No. A-76, ¶ 9a(5), 44 Fed. Reg. 20560 (1979).

²²⁸Id.

²²⁹Under federal procurement statutes and regulations, executive agencies' procurement actions must generally satisfy one or more specific criteria to authorize use of negotiated procurements. [10 U.S.C. §2304 (1976); 41 U.S.C. §252 (1976)].

At no time may an agency use auction techniques. [DAR §3-805.3(c); FPR 1-3.805-1(b)].

²³⁰OMB Circular No. A-76, ¶ 10c(1) provides that activities currently being performed in-house, which do not satisfy a non-cost exception, must be subjected to a cost comparison. [¶ 10c(1), 44 Fed. Reg. 20560].

²³¹OMB Circular No. A-76, ¶ 10c(2), 44 Fed. Reg. 20560 (1979).

²³²Id. at ¶ 10c(2).

²³³Id. at ¶ 10c(5).

²³⁴Id. at ¶ 10c(2).

²³⁵OMB Circular No. A-76, ¶ 5d, defines a "new start" as a newly-established Government commercial or industrial activity, including a transfer of work from contract to in-house performance. Also included is any expansion which would increase capital investment or annual operating cost by 100% or more. Under this definition a newly established contract activity is not a "new start." Id., 44 Fed. Reg. 20558.

²³⁶OMB Circular No. A-76, ¶ 10d, 44 Fed. Reg. 20561 (1979).

²³⁷Id. at ¶ 10d (4).

²³⁸This hypothesis has been borne out by experience. Under the bulletins it was always possible to contract, in preference to in-house performance, without a cost study. [See text accompanying note 212 supra]. Even at present there are allegations that executive agencies contract for services to avoid personnel ceilings. This is the subject of pending legislation in the House of Representatives. (See Hearings on H.R. 4717, supra note 66).

²³⁹OMB Circular No. A-76, ¶ 4c, 44 Fed. Reg. 20558 (1979).

²⁴⁰See OMB Circular No. A-76, ¶s 7b(1), 7c, 8a(1), 9a(5), 10c(1), 10d(4), and 10e(2) supra.

²⁴¹See note 212 supra.

²⁴²See notes 62 and 63 supra.

²⁴³BOB Circular No. A-76, ¶ 6 (1966)

²⁴⁴BOB Circular No. A-76, ¶ 6 (third unnumbered paragraph) (1967).

²⁴⁵OMB Circular No. A-76, ¶ 9 provides:

A decision for in-house performance based on economy must be supported by a comparative cost analysis...
[44 Fed. Reg. 20559]

Also see OMB Circular No. A-76, ¶ 10c(1), 44 Fed. Reg. 20561 (1979).

²⁴⁶See OMB Circular No. A-76, ¶ 10e(3), 44 Fed. Reg. 20561 (1979).

²⁴⁷Id. at ¶ 10d(4).

²⁴⁸Id. at ¶ 10c(1).

²⁴⁹Id. at ¶ 9a(1), 44 Fed. Reg. 20559.

²⁵⁰Cost Comparison Handbook, ch. II, pt. C (1979).

²⁵¹Id.

²⁵²Id.

²⁵³Comp. Gen. Dec. B-183040, 75-1 CPD ¶ 239 (1975).

²⁵⁴OMB Circular No. A-76, ¶ 6(2), 44 Fed. Reg. 20558 (1979).

²⁵⁵In determining whether the relationship created by a Government contract is that of employer and employee the Comptroller General and the Civil Service Commission consider "whether the terms of the contract permit or require detailed Government supervision over the contractor's employees," [51 Comp. Gen. 561, 562-563 (1972)]; or whether the contract would "permit the Government to dictate that a particular employee be assigned to perform services." [Comp. Gen. Dec. B-197099, 80-1 CPD ¶ 348 (1980)].

²⁵⁶OMB Circular No. A-76, ¶ 9a(2), 44 Fed. Reg. 20559 (1979).

²⁵⁷Cost Comparison Handbook, ch. III, pt. C(1)(d) (1979).

²⁵⁸Id., ch. I, pt. D; OMB Circular No. A-76, ¶ 9c(1), 44 Fed. Reg. 20560 (1979).

For Air Force cost studies conducted in FY 1979 in accordance with pre-1976 guidelines [Pub. L. No. 95-485, §814] it was determined that the Government realized a cost avoidance of \$37 million on 59 activities reviewed. This was broken

down to \$29 million in savings by contracting work previously performed in-house and \$8 million on 11 cost studies that remained in-house. The in-house savings estimate was the result of adjusted (reduced) work forces following the guidelines of the Circular suggesting that the agencies "assure that Government operations are organized and staffed for the most efficient performance." [¶9c(1), 44 Fed. Reg. 20560].

²⁵⁹See H.R. Rep. No. 729, 96th Cong., 1st Sess. 14 (1979).

²⁶⁰See GAO Report, Development of a National Make-or-Buy Strategy . . . supra note 32, at 45.

²⁶¹To the extent one class of workers is more productive, the man-hours of labor required would be less. That factor may be as significant as the wage scale in determining the outcome of a cost comparison. During the period for public comment prior to issuance of the revised circular both industry representatives and federal employee union representatives raised the issue of worker productivity claiming advantage through their respective methods of performance.

²⁶²OMB Circular No. A-76, ¶10a(4), 44 Fed. Reg. 20560 (1979).

²⁶³In conversations and interviews with agency officials from DOD it was disclosed that essentially all cost comparisons being made and finalized for FY 80 were resulting in conversions from in-house performance to contract. The single greatest factor leading to this result was higher personnel costs. This in turn was traced to higher manning projections for in-house work and higher pay scales for the average Government employee versus the average service employee hireable by a prospective contractor. See also GAO Report, Development of a National Make-or-Buy Strategy . . . , supra note 32, at 53-57.

²⁶⁴Cost Comparison Handbook, ch. III, pt. C (1979).

²⁶⁵Id. at C(1)(c).

²⁶⁶Id. at C(1)(d).

²⁶⁷Id. at C(1)(f).

²⁶⁸Id. at C(1)(g).

²⁶⁹OMB Circular No. A-76, ¶9c(2-4), 44 Fed. Reg. 20560 (1979).

²⁷⁰Id.

²⁷¹See Hearings on Military Posture and H.R. 10929, supra note 38, at 1879, 1964-1965, 2133-2134, and 2138. Also see BNA Govt. Cont. Rep. (News), No. 686, A-30, June 20, 1977.

²⁷²BOB Circular No. A-76, ¶6b(1) (1966).

²⁷³BOB Circular No. A-76, ¶6c(1) (1967).

²⁷⁴See Hearings on Military Posture and H.R. 10929, supra note 38, at 1895, 1934.

²⁷⁵Id. at 1934.

²⁷⁶Id. at 1894.

²⁷⁷See text accompanying note 271 supra.

²⁷⁸Hearings on Military Posture and H.R. 10929, supra note 38, at 1934.

²⁷⁹Id.

²⁸⁰Id. at 1891-1895.

²⁸¹Id. at 1934-1935. [Cost = $\frac{44.44 (1+S)^{12} (1+C)^{15}}{(1+I)^{27}}$ with

S = Average annual salary increase; C = Average annual inflation; I = Average interest rate for Civil Service Retirement trust fund].

²⁸²Id. at 1891-1892.

²⁸³See GAO Report, Development of a National Make-or-Buy Strategy . . . , supra note 32, at 48.

²⁸⁴Id.

²⁸⁵Hearings on Military Posture and H.R. 10929, supra note 38, at 1891-1892.

²⁸⁶Id. at 1891-1894.

²⁸⁷OMB Circular No. A-76, ¶9a(3), 44 Fed. Reg. 20559 (1979).

²⁸⁸See GAO Report, Development of a National Make-or-Buy Strategy . . . , supra note 32, at 43.

²⁸⁹Id.

²⁹⁰Id.

²⁹¹OMB Circular No. A-76, ¶9a(3), 44 Fed. Reg. 20559 (1979).

²⁹²Letter from Comptroller General of the United States to the Administrator of the Office of Federal Procurement Policy, B-158685, Jan. 25, 1978.

²⁹³Additional supplements are still being contemplated; however, there is no timetable for issuance. Currently work is being completed on materials for R&D activities and ADP. (Interview with Mr. Ken Gerken, Office of Federal Procurement Policy, April, 1980).

²⁹⁴Cost Comparison Handbook, ch. 1, pt. B (1979).

²⁹⁵Id.

²⁹⁶See GAO Report, Development of a National Make-or-Buy Strategy . . . , supra note 32, at 23-30.

²⁹⁷GAO Report, How to Improve Procedures for Deciding Between Contractor and In-House Military Base Support Services, LCD-76-347 (1977).

²⁹⁸The Air Force began using a firm-bid procedure for its make-or-buy decisions in the early 1970s. The method was adopted Defense-wide in 1976.

²⁹⁹OMB Circular No. A-76, ¶ 9b(1), 44 Fed. Reg. 20560 (1979).

³⁰⁰GAO Report, How to Improve Procedures for Deciding Between Contractor and In-House Military Base Support Services, LCD-76-347 (1977).

³⁰¹OMB Circular No. A-76, ¶ 9b(1), 44 Fed. Reg. 20560 (1979).

³⁰²Comp. Gen. Dec., B-186332, 76-2 CPD ¶ 302 (1976); Comp. Gen. Dec., B-183866, 76-1 CPD ¶ 389 (1976).

³⁰³See GAO Report, Development of a National Make-or-Buy Strategy, supra note 32, at 51.

³⁰⁴See DAR 18-108.1 and DAR 18-108.2 for construction and architect-engineer contracts.

³⁰⁵This view was expressed by an Air Force representative to the DAR Council. It was based on a discussion of the DARC Memo dated May 15, 1980 implementing OMB Circular No. A-76 [See CCH Govt. Cont. Rep. ¶ 79,100] and DAR Council Case 76-144, Firm Cost Concept for "Contracting Out". As he explained, it is clear that more than one estimate may be prepared to serve the different functions. One would be prepared for procurement/budgeting requirements and would be available to the Contracting Officer for those purposes. The CITA cost estimate, on the other hand, would be prepared separately by the special task group established under the procedures of the Cost Comparison Handbook to maintain its confidentiality and independence.

³⁰⁶OMB Circular No. A-76, ¶ 9a, 44 Fed. Reg. 20559 (1979).

³⁰⁷See note 48 supra. Also see H.R. Rep. No. 1985, supra note 10, at 15-16; Hearings on Progress Report on Discontinuance of Commercial-Type Operations by the Federal Government Before the Subcomm. of the Senate Select Comm. on Small Business, 85th Cong. 1st Sess., at 2 (1957).

³⁰⁸See note 55 supra.

³⁰⁹See Transmittal Memorandum No. 2, ¶ 4a, supra note 2.

³¹⁰5 U.S.C. § 5341 et seq. (1976).

³¹¹Service Contract Act of 1965, Pub. L. No. 89-286, 79 Stat. 1034 (1965).

³¹²Final Report of Study Group #1, Utilization of Resources, Commission on Government Procurement, ch. VII, at 135-138 (1972).

³¹³Id. at 138. This conclusion is based on the theory that a truly competitive market will eliminate the inefficient producer. For the effect of this principle in practice see note 258, supra on the results of Air Force cost studies for FY 1979.

³¹⁴Comp. Gen. Dec. B-198565, 80-1 CPD ¶325 (1980); DAR S1-311 (1976 ed.).

³¹⁵OMB Circular No. A-76, ¶9a(4), 44 Fed. Reg. 20559 (1979).

³¹⁶Comp. Gen. Dec. B-197752, 80-1 CPD ¶407 (1980).

³¹⁷Id. at 3-4. The "best and final" offer indicated that RCA considered Fort Gordon as a "cornerstone" for future business. RCA desired to capture a large share of the potential by making "initial investments to gain a foothold."

³¹⁸See note 89 supra.

³¹⁹OMB Circular No. A-76, ¶9e, 44 Fed. Reg. 20560 (1979).

³²⁰For labor intensive service activities the cost of equipment and facilities may be minimal; however, the standard cost factors based on personnel costs (i.e., payroll) tend to cause the same result. [See notes 269-285 supra and text accompanying].

A study conducted by the Air Force in 1980 determined that contractors submitting bids in cost comparison studies made in FY 1977 were not bidding low with the intent to increase prices in subsequent years to take advantage of the biases built into the Circular to favor the status quo. [Memo for the Deputy Assistant Secretary of Defense (Supply, Maintenance and Transportation) on Review of CITA Converted to Contract in FY 1977, dated May 27, 1980].

³²¹OMB Circular No. A-76, ¶3, 44 Fed. Reg. 20558 (1979).

³²²Hearings on Military Posture and H.R. 10929, supra note 38, at 1879-1881; also see 44 Fed. Reg. 20556 (1979).

³²³Cost Comparison Handbook, ch. II, pt. D, ¶6 (1979).

³²⁴Id.

³²⁵Interviews with agency officials from DOD and USAF. This interpretation was affirmed by OFPP. See notes 165 and 263 supra.

³²⁶See Cost Comparison Handbook, ch. II, pt. D, ¶6 (1979).

³²⁷Id.

328 Id.

329 The only remedy specified by the Circular for "significant discrepancies" is complete rejection of the in-house estimate for a "new start" or resolicitation of commercial bids for a subsequent cost comparison study for in-house activities. The temporary continuation of in-house performance "is not a gain in light of the disclosure of the Government's in-house estimate figures."

330 In the case of an activity presently being performed in-house, the Handbook provides that "the solicitation may be cancelled and the comparison rescheduled for a later date" if the estimate cannot be corrected within the validity date of bids or proposals.

331 See P. Schnitzer, Government Contract Bidding 506 (1976). As to the broad discretion of the procuring agency in deciding whether to cancel an IFB after bid opening with or without resolicitation, see 54 Comp. Gen. 973 (1975) and Preventive Health Programs, Inc., B-195877, January 22, 1980, 80-1 CPD ¶ 63.

332 Hearings on Military Posture and H.R. 10929, supra note 38, at 1900.

333 See BNA Fed. Cont. Rep. (News), No. 714, A-2,3, Jan. 16, 1978; BNA Fed. Cont. Rep. (News), No. 758, A-19,20, Nov. 27, 1978; BNA Fed. Cont. Rep. (News), No. 759, A-20, Dec. 4, 1978.

334 OMB Circular No. A-76, ¶ 11a, 44 Fed. Reg. 20561 (1979).

335 Id.

336 The Circular provides that the agencies' appeal procedure will provide for review of the "initial determination and the rationale upon which the decision was based." [¶ 11a, supra note 334]. It is unclear what the "initial determination" would be. The cost comparison procedure outlined in the Handbook does not provide for public announcement of any results until the Decision Summary Form and the Cost Comparison Form have been "audited" by a "qualified activity independent of the cost analysis, and reviewed and approved by the approving authority for announcement by the Contracting Officer. Following the 5 or 15 day review period the contract is awarded or the solicitation cancelled in favor of in-house performance. [Cost Comparison Handbook, ch. II, pt. D, ¶s 6-10].

quotation marks?

337 Such an interpretation would be consistent with the use of the term "initial determination" as opposed to the final or ultimate decision, and the reference to the phrase "determinations made under this Circular." [¶ 11a, supra note 334].

338 The exception to the policy of reliance on the private sector on the basis of higher costs merely reflects the outcome of a cost comparison study under the procedures of the Circular. The other exceptions are based on determinations made under the guidelines of the Circular without regard to cost. [¶ 8, 44 Fed. Reg. 20559]. See text accompanying notes 92-110 supra.

339 OMB Circular No. A-76, ¶ 9a(5), 44 Fed. Reg. 20560 (1979).

³⁴⁰Id. at ¶s 9d and 9e.

³⁴¹Id. at ¶10d(4), 44 Fed. Reg. 20561.

³⁴²Id. at ¶11a(1), 44 Fed. Reg. 20561. Also see note 336 supra.

³⁴³For a flow chart of the decision-making process see OMB Circular No. A-76, Attachment B, 44 Fed. Reg. 20563 (1979); also Cost Comparison Handbook, ch. II.

³⁴⁴OMB Circular No. A-76, ¶11a, 44 Fed. Reg. 20561 (1979).

³⁴⁵Id.

³⁴⁶Id. at ¶11c.

³⁴⁷Id. at ¶11a(2) and ¶11c.

³⁴⁸See Schnitzer, Handling Bid Protests Before GAO, Edition II, Govt. Ctr. Briefing Papers 77-4 (1977).

³⁴⁹4 C.F.R. §20.1 (1980).

³⁵⁰4 C.F.R. §§20.1, 20.2 (1980).

³⁵¹The remedies available to a protester before award include withholding award during the pendency of the protest, preventing award on the basis of a defective or unduly restrictive solicitation, and, in some cases, a recommendation for award of the contract to the protester. [See Schnitzer, Handling Bid Protests Before GAO, Edition II, supra note 348, at 8, 11]. However, unlike the GAO, the agency under the appeal process is the authority to take direct corrective action. For this reason the intra-agency appeals process is essentially like the protest to the Contracting Officer which may precede the protest to the GAO. [See P. Schnitzer, Government Contract Bidding 513 (1976)].

³⁵²Comp. Gen. Dec. B-186691, 76-2 CPD ¶351 (1976); 54 Comp. Gen. 767, 75-1 CPD ¶166 (1975); Comp. Gen. Dec. B-181265, 74-2 CPD ¶298 (1974); Comp. Gen. Dec. B-188141 77-1 CPD ¶104 (1977); 55 Comp. Gen. 397, 75-2 CPD ¶245 (1975).

³⁵³Comp. Gen. Dec. B-184852, 75-2 CPD ¶242 (1975); Comp. Gen. Dec. B-186502, 76-2 CPD ¶56 (1976).

³⁵⁴OMB Circular No. A-76, ¶11c, 44 Fed. Reg. 20561 (1979).

³⁵⁵See text accompanying notes 337-344 supra.

³⁵⁶Comp. Gen. Dec. B-188054, 77-2 CPD ¶321 (1977) and Comp. Gen. Dec. B-190183, 78-1 CPD ¶444 (1978). Also see 42 Comp. Gen. 640, 642 (1963) and 53 Comp. Gen. 86, 88 (1973). Also see note 5 supra; and Cibinic and Lasken, The Comptroller General and Government Contracts, 38 Geo. Wash. L. Rev. 349, 372-373 (1970).

³⁵⁷Comp. Gen. Decs. B-195733, B-196117, 80-1 CPD ¶ 89 (1980).

³⁵⁸DAR 2-407.8(b)(2); FPR 1-2.408(b)(3). See also 4 C.F.R. §20.4.

³⁵⁹OMB Circular No. A-76, ¶11a, 44 Fed. Reg. 20561 (1979)

³⁶⁰42 Comp. Gen. 640, 642 (1963); 53 Comp. Gen. 86, 88 (1973); and Comp. Gen. Dec. B-189430, 78-2 CPD ¶ 9 (1978).

³⁶¹Comp. Gen. Dec. B-183487, 75-2 CPD ¶ 12 (1975).

³⁶²Comp. Gen. Dec. B-183866, 76-1 CPD ¶ 389 (1976); Comp. Gen. Dec. B-186332, 76-2 CPD ¶ 302 (1976).

³⁶³Comp. Gen. Dec. B-194505, 79-2 CPD ¶ 38 (1979).

³⁶⁴Id. at 2.

³⁶⁵Id.

³⁶⁶The "significant issue" exception is reserved for protest issues involving a procurement principle of broad application which has not been considered before. [See Comp. Gen. Dec. B-185339, 76-1 CPD ¶ 350 (1976); Schnitzer, Handling Bid Protests Before GAO, Edition II, supra note 348, at 7]. For a categorical listing of issues accepted for review under this exception see R. Nash, Jr. and J. Cibinic, Jr., Federal Procurement Law, Volume I, Contract Formation 854, n.2(c) (1977).

³⁶⁷Comp. Gen. Dec. B-194580, 79-2 CPD ¶ 66 (1979).

³⁶⁸Id. at 2.

³⁶⁹Id.

³⁷⁰Id.

³⁷¹See discussion of the Crown Laundry decision at Comp. Gen. Decs. B-195733 and B-196117, 80-1 CPD ¶ 89 (1980).

³⁷²Id. at 3.

³⁷³79-2 CPD supra note 367, at 2.

³⁷⁴Comp. Gen. Dec. B-195684, 79-2 CPD ¶ 379 (1979).

³⁷⁵Id.

³⁷⁶DOD Appropriation Authorization Act, 1979, Pub. L. No. 95-485, Title VIII, §814, 92 Stat. 1625 (1978).

³⁷⁷79-2 CPD supra note 374, at 2-3.

³⁷⁸ Agency decisions on the method of procurement to be used will not be disturbed by GAO absent a clear showing that the determination lacked a reasonable basis. [53 Comp. Gen. 270 (1973); Comp. Gen. Dec. B-182556, 75-1 CPD ¶218 (1975)]. It also has been the policy of the GAO to accept the facts as asserted by the procuring agency when the written evidence in the record is in conflict. It applies a "presumption of correctness" to the agency's administrative report. [42 Comp. Gen. 126, 134 (1962)].

³⁷⁹ Comp. Gen. Decs. B-195733 and B-196117, 80-1 CPD ¶89 (1980).

³⁸⁰ In this context "standing" is used to refer to a proper party, i.e., an "interested party" and "justiciability" refers to a proper issue for a bid protest. In the literal sense, the Comptroller General does not follow the judicially established standing rules in determining who is an interested party. [See Comp. Gen. Dec. B-178752, 74-1 CPD ¶139 (1974)]

³⁸¹ 80-1 CPD supra note 379, at 3.

³⁸² 79-2 CPD supra note 363, at 2; Comp. Gen. Dec. B-183866, 76-1 CPD ¶389 (1976).

³⁸³ Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

³⁸⁴ The decision in Scanwell Laboratories Inc. v. Sheffer, 424 F.2d 859 (D.C. Cir. 1970) has not been reviewed or affirmed by the Supreme Court; however, it has been followed by most other federal courts. For a more detailed analysis and listing of positions taken by the various federal circuit courts see R. Nash, Jr. and J. Cibinic, Jr., Federal Procurement Law, Volume I, Contract Formation 834-835, n. 1 (1977).

³⁸⁵ Steinthal v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971); Wheelabrator v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971).

³⁸⁶ Allen Campbell Co. v. Lloyd Wood Const. Co., 446 F.2d 261 (5th Cir. 1971).

³⁸⁷ Schoonmaker v. Resor, 445 F.2d 726 (D.C. Cir. 1971).

³⁸⁸ 4 C.F.R. §20.10 (1980); 55 Comp. Gen. 546 (1975).

³⁸⁹ Schoonmaker v. Resor, supra note 387; Steinthal v. Seamans, supra note 385; Wheelabrator v. Chafee, supra note 385.

³⁹⁰ Steinthal v. Seamans, supra note 385.

³⁹¹ National Cash Register Co. v. Richardson, (D.C.D.C. 17 Feb 1971), 13 G.C. ¶109.

³⁹² Id.

³⁹³ Administrative Procedure Act (APA), 5 U.S.C. §§701 et seq. (1976).

³⁹⁴5 U.S.C. §701(a)(2) (1976).

³⁹⁵Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979).

³⁹⁶Id. at 582.

³⁹⁷Id. at 583.

³⁹⁸Id. at 579.

³⁹⁹Id. at 580-581.

⁴⁰⁰5 U.S.C. §§301, 302, 305 (1976).

⁴⁰¹602 F.2d, supra note 395, at 581.

⁴⁰²Id. at 581-583.

⁴⁰³Id. at 581.

⁴⁰⁴OMB Circular No. A-76, ¶3, 44 Fed. Reg. 20558 (1979).

⁴⁰⁵Id. at ¶6.

⁴⁰⁶Id. at ¶9, 44 Fed. Reg. 20559.

⁴⁰⁷Id. at ¶9d, 44 Fed. Reg. 20560.

⁴⁰⁸Id. at ¶9e.

⁴⁰⁹Id. at ¶9b(2) and ¶9c.

⁴¹⁰Id. at ¶8, 44 Fed. Reg. 20559. Also see Chapter 2.

⁴¹¹OMB Circular No. A-76, ¶10c(1), 44 Fed. Reg. 20560 (1979).

⁴¹²Id. at ¶9a(5).

⁴¹³Id. at ¶10d(4), 44 Fed. Reg. 20561.

⁴¹⁴Id. at ¶10c(2).

⁴¹⁵The Circular at ¶11b provides:

"This procedure does not authorize an appeal
outside the agency or a judicial review."
[44 Fed. Reg. 20561]

Also see text accompanying note 404 supra.

The "Kazen Amendment" to §804 of the FY 1981 Defense Appropriations Act [8-80 Cong. Rec. H3716 (daily ed. May 15, 1980)] would have established a

statutory right for Government employees who receive reduction in force (RIF) notices to seek injunctive relief and judicial review of agency decisions to contract work previously conducted by those Government employees. The amendment was offered and accepted on the floor of the House. It was included in the House version of the bill, but it was deleted by the Conference Committee. As a result the final bill signed by the President did not contain the right for judicial review of contracting out decisions. [Pub. L. No. 96-527, ___ Stat. ___ (Dec. 15, 1980)]

⁴¹⁶ Local 2855, AFGE (AFL-CIO) v. United States, 602 F.2d 574 (3d Cir. 1979); Local 1568, AFGE v. Dunn, 561 F.2d 1310 (9th Cir. 1977); Local 1858, AFGE v. Callaway, 398 F. Supp. 176 (N.D. Ala. 1975); AFGE v. Hoffman, 427 F. Supp. 1048 (N.D. Ala. 1976); AFGE v. Middendorf, Civil No. 75-4077 (D.C. R.I., Sept. 15, 1976); AFGE v. Stetson, Civil No. 77-2146 (D.C. D.C., July 25, 1979).

⁴¹⁷ Descomp. Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974); Merrian v. Kunzig, 476 F. 2d 1233 (3d Cir.) cert. denied 414 U.S. 911 (1973).

Also see ADVO-System, Inc. v. Kreps, Civil No. 79-0257 (D.C.D.C., filed Jan 25, 1979). See discussion of reviewability issue on reference to the Comptroller General of the United States, Comp. Gen. Dec. B-194088, 79-1 CPD ¶ 301 (1979).

⁴¹⁸ Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

⁴¹⁹ See note 384 supra and text accompanying.

⁴²⁰ Lodge 1858, AFGE v. Paine, 436 F.2d 882, 884-885 (D.C. Cir. 1970).

⁴²¹ Id. at 892-893.

⁴²² Id. at 893.

⁴²³ AFGE v. Hoffman, 427 F. Supp. 1048, 1082 (N.D. Ala. 1976).

⁴²⁴ Id.

⁴²⁵ Id. at 1083.

⁴²⁶ OMB Circular No. A-76, ¶10a(4), 44 Fed. Reg. 20560 (1979).

⁴²⁷ Id. at ¶ 7, 44 Fed. Reg. 20558-59.

⁴²⁸ The Circular provides that "excess property and services available from other Federal agencies should be used in preference to new starts or contracts." [¶ 7a, 44 Fed. Reg. 20558-59]. See text accompanying notes 111-117 supra.

⁴²⁹ 427 F. Supp. supra note 423, at 1083.

⁴³⁰ OMB Circular No. A-76, ¶ 8, 44 Fed. Reg. 20558 (1979).